

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

BRIGHT RESPONSE, LLC                   \*     Civil Docket No.  
  \*     2:07-CV-371  
VS.                                       \*     Marshall, Texas  
  \*  
  \*     August 5, 2010  
GOOGLE, INC., ET AL                   \*     8:30 A.M.

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF:     MR. ANDREW SPANGLER  
                              Spangler Law  
                              208 North Green Street  
                              Suite 300  
                              Longview, TX     75601  
  
                              MR. MARC A. FENSTER  
                              MR. ANDREW WEISS  
                              MR. ADAM HOFFMAN  
                              MR. ALEX GIZA  
                              Russ, August & Kabat  
                              12424 Wilshire Boulevard  
                              12th Floor  
                              Los Angeles, CA     90025  
  
                              MR. DAVID M. PRIDHAM  
                              Law Office of David Pridham  
                              25 Linden Road  
                              Barrington, RI     02806

APPEARANCES CONTINUED ON NEXT PAGE:

COURT REPORTERS:     MS. SUSAN SIMMONS, CSR  
                              MS. JUDITH WERLINGER, CSR  
                              Official Court Reporter  
                              100 East Houston, Suite 125  
                              Marshall, TX     75670  
                              903/935-3868

(Proceedings recorded by mechanical stenography,  
transcript produced on CAT system.)

APPEARANCES CONTINUED:

FOR THE PLAINTIFF: MS. ELIZABETH A. WILEY  
The Wiley Firm  
P.O. Box 303280  
Austin, TX 78703

MR. PATRICK R. ANDERSON  
Patrick R. Anderson, PLLC  
4225 Miller Road  
Building B-9, Suite 358  
Flint, MI 48507

MR. JOHN C. HUESTON  
MR. ADAM S. GOLDBERG  
Irell & Manella, LLP  
840 Newport Center Drive  
Suite 400  
Newport Beach, CA 92660

FOR THE DEFENDANT: MR. CHARLES K. VERHOEVEN  
(Google) MR. DAVID A. PERLSON  
MS. AMY H. CANDIDO  
Quinn Emanuel Urquhart & Sullivan  
50 California Street  
22nd Floor  
San Francisco, CA 94111

MS. JENNIFER PARKER AINSWORTH  
Wilson Robertson & Cornelius  
P.O. Box 7339  
Tyler, TX 75711

FOR THE DEFENDANT: MS. JENNIFER HALTOM DOAN  
(Yahoo!) Haltom & Doan  
6500 Summerhill Road  
Suite 100  
Texarkana, TX 75503

APPEARANCES CONTINUED ON NEXT PAGE:

1 APPEARANCES CONTINUED:

2  
3 FOR THE DEFENDANT: MR. WILLIAM ROOKLIDGE  
4 (Yahoo!) Howrey, LLP  
5 4 Park Plaza, Suite 1700  
6 Irvine, CA 92614

7 MR. JASON WHITE  
8 Howrey, LLP  
9 321 North Clark Street  
10 Suite 3400  
11 Chicago, IL 60610

12 \* \* \* \* \*

13 P R O C E E D I N G S

14 (Jury out.)

15 THE COURT: Be seated.

16 All right. What's the issue -- issues?

17 MR. HUESTON: Your Honor, I have been  
18 informed by Yahoo! counsel that in cross-examination he  
19 intends to get into the following: That now having  
20 received the benefit --

21 MR. ROOKLIDGE: Your Honor, if I might --  
22 I'm sorry I have to interrupt -- but could we discuss  
23 this outside the presence of the witness?

24 THE COURT: Well, for what purposes,  
25 Mr. Rooklidge?

MR. ROOKLIDGE: This is about the  
permissible scope of cross-examination of this witness.

1 In view of this Court's order, I don't want to get  
2 anywhere close to a problem with this Court's order.

3 THE COURT: Well, you know, I've been in  
4 chambers since 10 till 8:00 this morning. We could have  
5 discussed it outside the presence then, but I'll allow  
6 you to do it.

7 The time for this hearing is being  
8 charged equally against both sides.

9 (Bench conference.)

10 MR. ROOKLIDGE: Your Honor, I wanted to  
11 make sure --

12 THE COURT: Well, Mr. Rooklidge, he was  
13 addressing me. Wait until he's through.

14 MR. ROOKLIDGE: Okay.

15 MR. HUESTON: I've been informed that  
16 Mr. Rooklidge would like to cross-examine the expert  
17 witness.

18 Having received the benefits and watching  
19 me abide by the Court's ruling and not questioning him  
20 at all about any potential applicability of the Stanford  
21 license to his Yahoo! calculation, he would now, after  
22 the depositions went on where he, you know, talked about  
23 the Google license, would now like to cross-examine him  
24 and say: Isn't it true that you used that  
25 Google-Stanford license as a data point in your

1 calculation of the Yahoo! range?

2                   And I think that's just inherently unfair  
3 to have us redact it out of the direct and create a  
4 direct where he's talked about how he fairly came to his  
5 range and --

6                   THE COURT: I understand the dispute.

7                   How is this relevant?

8                   MR. ROOKLIDGE: Your Honor, he admitted  
9 in his deposition this was the basis for the royalty  
10 range he's asserting today.

11                  THE COURT: Well, I'm going to let you  
12 do -- if you're going to go into that in  
13 cross-examination and you're telling me that, then I'm  
14 going to allow him -- well, no, I'm not. I'm not going  
15 to let you go into that, Mr. Rooklidge.

16                  MR. ROOKLIDGE: I'll stay away from it.

17                  THE COURT: You know, y'all did receive  
18 the benefit of that, and it's not been the basis for any  
19 opinions given to the jury, you know, in the course of  
20 this case. And I've instructed the jury they're not to  
21 consider that.

22                  I'm not going to let you go into that.

23                  MR. ROOKLIDGE: Thank you, Your Honor.

24                  MR. SPANGLER: Your Honor, while we're up  
25 here, the -- on Monday, the Defendants identified a file

1 and went through a request to have an adverse inference  
2 instruction on discovery.

3               Since that time, we have asked repeatedly  
4 if they are, in fact, going to urge it so that we can  
5 give a counter, if necessary. And to date, they  
6 haven't. We just asked for an order to let us know if  
7 they're going to submit one.

8               THE COURT: Well, it's the Court's  
9 charge. If I decide to give an adverse inference  
10 instruction about any discovery, it's going to be one  
11 that takes into account the discovery violations, the  
12 technical problems I've found existed throughout this  
13 case, okay?

14              MR. SPANGLER: Yes, Your Honor.

15              THE COURT: And, you know, I just tell  
16 you, the types of instructions -- I don't know which way  
17 they cut, but any one that I would give adverse to  
18 you-all would take into account the violations that I  
19 previously had found occurred in this case as well as  
20 with respect to at least one of the other Defendants,  
21 that being the Yahoo! Defendants.

22              And I'm -- I'm still in the process of  
23 considering the charge issues. You're going to get a  
24 draft of the charge before you leave tonight, but you  
25 don't need to -- I mean, I know what the issue is.

1 MR. SPANGLER: We're not going to seek  
2 that, Your Honor, just to be clear on the record.

3 THE COURT: Yes, sir, Mr. Pridham?

4 MR. PRIDHAM: Your Honor, one issue has  
5 come up that we need to address for this morning's  
6 testimony.

7 The parties entered into a stipulation  
8 related to the reexamination of the patent-in-suit.  
9 There are two Plaintiff's exhibits that have not been  
10 entered yet, Plaintiff Exhibit 3, Plaintiff Exhibit  
11 1043.

12 I'm told that Google does not object to  
13 the entry of these exhibits, and Yahoo! has not given us  
14 a response.

15 MS. DOAN: Well, we had looked at it,  
16 Your Honor, like 30 seconds before we walked in, so I  
17 don't have a problem with it as long as we can cross him  
18 on the other documents with it as well and he doesn't --  
19 if he's going to know about these, I'm assuming he's  
20 going to know about all the reexam.

21 THE COURT: I don't know where he's going  
22 to go with it.

23 MR. PRIDHAM: Again, as long as there are  
24 communications with the Patent Office, we've already  
25 told --

1 MS. DOAN: I don't have any --

2 MR. PRIDHAM: -- we don't have a problem  
3 with it.

4 MS. DOAN: I don't know that he has  
5 personal knowledge of any of these. In his deposition,  
6 he testified that his lawyers were handling those, and  
7 he would look at it only for typos, and he would -- he  
8 couldn't answer any questions about the reexam, other  
9 than he knew it went through his lawyer.

10 And I thought there was a motion in  
11 limine that the 30(b6) depo -- from him to testify in  
12 connection with the testimony they had already given.

13 MR. PRIDHAM: I'm sorry. In his  
14 deposition, Your Honor, Mr. Sheafe testified that he  
15 manages that process, that he receives that process.  
16 I'll get you the testimony.

17 MS. DOAN: I have it.

18 MR. PRIDHAM: But he said that he,  
19 day-to-day, manages the reexamination, including looking  
20 at all these documents and approving all these  
21 documents.

22 THE COURT: As I recall, the debate about  
23 the 30(b6) issues dealt with the issue of license  
24 agreements. So I'm going -- I'm assuming at this time  
25 that there's no problem introducing those documents,



1 okay?

2 MR. PRIDHAM: Thank you.

3 MS. DOAN: Thank you, Your Honor.

4 (Bench conference concluded.)

5 THE COURT: All right. One other thing  
6 it appears that we've overstated the time the Plaintiff  
7 had used yesterday by four minutes. The Plaintiff has  
8 used a total of 9 hours.

9 Defendants' time we found is accurate,  
10 and you have used a total of 4 hours and 3 minutes.

11 Y'all have each used an additional three  
12 minutes by virtue of this hearing.

13 Bring in the jury.

14 LAW CLERK: All rise.

15 (Jury in.)

16 THE COURT: Please be seated.

17 Mr. Verhoeven, you may continue your  
18 cross-examination.

19 MR. VERHOEVEN: Thank you, Your Honor.

20 STEPHEN L. BECKER, Ph.D., PLAINTIFF'S WITNESS,

21 PREVIOUSLY SWORN

22 CROSS-EXAMINATION (CONTINUED)

23 BY MR. VERHOEVEN:

24 Q. Good morning, Dr. Becker.

25 A. Good morning.

1           Q.    I think we left off yesterday with the  
2 Keystone Automotive license agreement?

3           A.    Yes.

4           Q.    Remember that?  And that was the license that  
5 was approximately 11 months after the hypothetical  
6 negotiation, and it was for a lump sum of \$500,000?

7           A.    Yes.

8           Q.    You remember that?

9                   Now, I'd like to move on to Defendants'  
10 Exhibit 134, please.

11                   MR. VERHOEVEN:  And if we could put up  
12 the first paragraph of this.

13           Q.    (By Mr. Verhoeven) You have seen the  
14 document -- this is also in your binder, Dr. Becker, so  
15 you are free to turn to it, if you would like to.

16           A.    Yes, I have it.

17           Q.    You've seen this agreement before as well,  
18 haven't you?

19           A.    Yes.

20           Q.    And this is an agreement between Kana Software  
21 Company and a company called Polaris; is that right?

22           A.    Yes.

23           Q.    And that's a company that's owned by  
24 Mr. Spangenberg as well, correct?

25           A.    I can't tell you who owns Polaris.

1 Q. Okay. I direct your attention to the Exhibit  
2 A to this agreement. The control number is 1324, sir.

3 MR. VERHOEVEN: And, Ryan, if we could  
4 put that up, please, and highlight the list of patents  
5 in this agreement.

6 A. Yes, I see them.

7 Q. (By Mr. Verhoeven) There's three of them?

8 A. Yes.

9 Q. And one of those is the '947 patent, right?

10 A. Yes, the one in the middle.

11 Q. And that's the patent in this case?

12 A. Yes.

13 Q. And this is a patent license and settlement  
14 agreement, right?

15 A. Yes.

16 Q. I direct your attention to the page bearing  
17 Control No. 1315, sir.

18 And if we could look at the paragraph under  
19 Consideration.

20 A. Yes.

21 Q. And you see there it says, quote:  
22 Consideration of the license, release, and covenants  
23 granted by Polaris and the dismissal of the Pol -- and  
24 the dismissal by Polaris of the litigation hereunder,  
25 Kana agrees to pay Polaris a total of 1 million U.S.

1 dollars.

2 A. Yes.

3 Q. Do you see that?

4 A. Yes.

5 Q. That's a lump-sum agreement?

6 A. That's a lump-sum settlement agreement, yes.

7 Q. That's a million dollars in total; is that  
8 right?

9 A. Yes.

10 Q. And that's for a license to the '947 patent?

11 A. It includes the license, yes.

12 Q. That's the very patent at issue in this case?

13 A. Yes.

14 Q. And if each of those three patents are valued  
15 equally, what would that come out to per patent?

16 A. \$333,000, roughly, per patent.

17 Q. Okay. I direct your attention to Defendants'  
18 Exhibit 142 in your binder, please.

19 A. I'm there.

20 MR. VERHOEVEN: And, Ryan, would you  
21 bring up the first paragraph.

22 Thank you.

23 Q. (By Mr. Verhoeven) Now, you've seen this  
24 agreement before as well as part of your investigation,  
25 correct, sir?

1           A.     Yes.

2           Q.     And this is an agreement between a company  
3 called Plutus IP Holdings and Black & Decker Company.

4                     Do you see that?

5           A.     Yes.

6           Q.     And Plutus IP Holdings, is that another  
7 company that's owned by Mr. Spangenberg?

8           A.     It's a company that I understand to be related  
9 to Orion in some way, but I can't tell you who owns it.

10          Q.     So it's your understanding it's related to  
11 Orion; is that right?

12          A.     Yes.

13          Q.     And Orion is the entity that the jury, in your  
14 opinion, should be thinking of in terms of the  
15 hypothetical negotiation, right?

16          A.     Yes.

17          Q.     I direct your attention to Exhibit C. This  
18 has Control No. 2502.

19                     MR. VERHOEVEN: Ryan, put that up,  
20 please, and highlight the text.

21                     Thank you.

22          Q.     (By Mr. Verhoeven) Do you see Exhibit C, sir?

23          A.     Yes.

24          Q.     Do you see there's a list of 13 patents?

25          A.     I'm going to take your representation that

1 there are 13. I see the list.

2 Q. Okay. Do you recognize any of those patents?

3 A. Yes. I recognize the '947, about two-thirds  
4 of the way down at the top.

5 THE COURT: Counsel, approach briefly.

6 (Bench conference.)

7 THE COURT: Two things. How many of  
8 these do you intend to go through?

9 MR. VERHOEVEN: I have to get my thing  
10 and tell you, but it's right there on the list -- no,  
11 it's not.

12 Can I just get it for you? It's like  
13 another four or five, I think.

14 THE COURT: It's going to be about seven  
15 or eight total. Let's try to restrict it to about five,  
16 okay?

17 It's going to be cumulative by the time  
18 you get through, and also don't ask about who Plutus is  
19 or suggest it, okay?

20 MR. VERHOEVEN: Yes, Your Honor.

21 THE COURT: Mr. Verhoeven, counsel, you  
22 may ask him who owns Plutus and what it is, but don't  
23 suggest what Plutus represents. You understand?

24 MR. VERHOEVEN: I won't even go into it,  
25 Your Honor.

1                   THE COURT: You can ask who owns it, what  
2 his understanding is.

3                   MR. VERHOEVEN: I don't need to. I'll  
4 just go to who has the '947 in it. That's all I need to  
5 do.

6                   I'm sorry, Your Honor. Just one more.

7                   THE COURT: All right.

8                   MR. VERHOEVEN: I was going to do three  
9 more. Is that too many?

10                  THE COURT: No, that's fine.

11                  I understand what you're doing, and you  
12 can ask him to sum up at the end. I'm suggesting that  
13 the balance of them would have, you know, similar  
14 numbers in them, but I'm just not going to --

15                  MR. VERHOEVEN: I understand, Your Honor.

16                  THE COURT: I don't want to slog through  
17 the whole body of them, okay?

18                  (Bench conference concluded.)

19                  Q. (By Mr. Verhoeven) Okay. Dr. Becker, we're on  
20 Exhibit C.

21                  Are you with me there?

22                  A. Yes.

23                  Q. And one of the patent license is the '947,  
24 correct?

25                  A. Yes.

1 Q. And if you go to Page 4 of this agreement,  
2 which has Control No. 2490, sir.

3 MR. VERHOEVEN: If you'll bring up 5.1,  
4 Ryan.

5 Thank you.

6 Q. (By Mr. Verhoeven) You'll see this section  
7 talks how much was paid for the license for all of those  
8 patents?

9 A. Yes.

10 Q. And the total comes out to \$650,000; is that  
11 right, sir?

12 A. Yes.

13 Q. This is a lump-sum payment?

14 A. Well, it's a fixed amount. It's -- typically,  
15 a lump sum is paid in one -- one payment. This is  
16 spread out over eight payments, but it's a fixed amount  
17 of money.

18 Q. Fixed amount of money?

19 A. Yes.

20 Q. Let's go to Defendants' Exhibit 141, please.

21 MR. VERHOEVEN: Ryan, if we could bring  
22 up the first page.

23 Q. (By Mr. Verhoeven) Are you with me,  
24 Dr. Becker?

25 A. I am.



1 Q. Okay. You've seen this agreement before as  
2 well, right?

3 A. I have.

4 Q. And this is also a patent license and  
5 settlement agreement, correct?

6 A. Right.

7 Q. Between Plutus IP and a company called  
8 Whirlpool Corporation and Maytag Corporation?

9 A. Yes.

10 Q. And I direct your attention to Exhibit C of  
11 this agreement, sir, which is on Page 2393.

12 A. I'm there.

13 Q. And do you see there's a list of 19 patents on  
14 this page?

15 A. I do.

16 MR. VERHOEVEN: It's kind of hard to see,  
17 Ryan. Could we bring up just the left page? Okay.

18 Q. (By Mr. Verhoeven) And do you see Item 12  
19 there, sir?

20 A. I do.

21 Q. And can you tell the jury what patent's listed  
22 there?

23 A. That's the '947 patent.

24 Q. Okay. And I direct your attention back to  
25 Page 5 of this agreement, sir, Page 2380.

1 A. I'm there.

2 Q. And this is what was paid for this license for  
3 all those patents, including the '947, right, sir?

4 A. Yes.

5 Q. And the total is 1.5 million?

6 A. Yes.

7 Q. That's a lump sum?

8 A. Yes.

9 Q. Comes out to less than a hundred thousand per  
10 patent?

11 A. If one simply does the math, yes.

12 Q. I direct your attention, sir, to Defendants'  
13 Exhibit 192.

14 Let me know when you get there, sir.

15 A. I'm there.

16 Q. You've seen this license agreement as well,  
17 haven't you?

18 A. Yes.

19 Q. This one's between Orion and Bloomingdale's  
20 and Macy's; is that right?

21 A. Yes.

22 Q. And I direct your attention to Exhibit A, sir.  
23 This is Page 9851.

24 MR. VERHOEVEN: Ryan, could you highlight  
25 that, please?

1                   Thank you.

2           Q.     (By Mr. Verhoeven) This is a list of the  
3 patents subject to the license agreement, sir?

4           A.     Yes.

5           Q.     Up at the top, it says List of Orion Patents?

6           A.     Yes.

7           Q.     And you see that there's the '947 patent  
8 included in the list of 14 patents?

9           A.     I do.

10          Q.     Okay. So the '947 is licensed in this  
11 agreement as well?

12          A.     Yes.

13          Q.     Direct your attention to Page 5 of this  
14 agreement, which has Control No. 9842, sir.

15          A.     I'm there.

16          Q.     And you see under Section 5.1, it's the amount  
17 that got paid for this patent license; is that right?

18          A.     Yes.

19          Q.     And the total is \$900,000, right?

20          A.     Yes.

21          Q.     For 14 patents?

22          A.     Yes.

23          Q.     Including the '947?

24          A.     That's correct.

25          Q.     And if you average that out, that's about

1 \$65,000 per patent?

2 A. Yes.

3 Q. And this is a lump-sum agreement?

4 A. Yes.

5 Q. Okay. I direct your attention to Defendants'  
6 Exhibit 994. It's towards the back of your binder, sir.

7 A. I'm there.

8 Q. You see this is a patent license and  
9 settlement agreement -- excuse me -- withdraw that  
10 question.

11 Do you see this says Patents-in-Suit  
12 Settlement Agreement?

13 A. Yes.

14 Q. And if you go back into it at Exhibit G -- and  
15 this is at Control No. 4344, sir.

16 A. I'm at 4344.

17 Q. Okay. You see there there is a limited  
18 covenant not to sue between Bright Response and a  
19 company called Apple, Inc.

20 A. Yes.

21 Q. And then if you go to the back of this Exhibit  
22 G, Attachment 1, Page 356, sir.

23 Did you find it?

24 A. I've got it.

25 Q. Okay. The patents subject of this agreement

1 looks like there's three patents and one application; is  
2 that right?

3 A. Yes.

4 Q. And one of those patents is the '947 patent,  
5 the same patent in this suit, right?

6 A. Yes.

7 Q. And if you go back to Page (sic) 4, Page 347,  
8 sir.

9 A. I'm there.

10 MR. VERHOEVEN: This is Page 347, Ryan,  
11 the bottom, Control No. 347.

12 Q. (By Mr. Verhoeven) Just one second,  
13 Dr. Becker. We'll get it up on the screen.

14 A. All right.

15 Q. Section 4.1 is Consideration. That's the  
16 amount of money they got paid, right?

17 A. Yes.

18 Q. And \$20,000?

19 A. Yes.

20 Q. Okay. That's a lump sum?

21 A. Yes.

22 Q. Okay.

23 MR. VERHOEVEN: Let's put up DX Demo 71,  
24 please, Ryan.

25 Q. (By Mr. Verhoeven) So this is a summary of the

1 agreements we went through yesterday afternoon and this  
2 morning, sir: The Banter agreement, Keystone  
3 Automotive, the Kana Software, Black & Decker,  
4 Whirlpool, Macy's, and Apple.

5 Do you see that?

6 A. I do.

7 Q. And all I've done here is summarized the  
8 agreements we went through.

9 Do you see that, in terms of the amount of  
10 money paid?

11 A. I see what you're doing here, yes, sir.

12 Q. So to Banter, the payment was a lump sum of  
13 \$150,000, right?

14 A. Yes.

15 Q. Keystone was \$500,000, correct?

16 A. Yes.

17 Q. Kana Software, a million dollars?

18 A. Yes.

19 Q. Black & Decker, a series of lump-sum payments  
20 totaling 650,000?

21 A. Yes.

22 Q. Whirlpool is 1.5 million?

23 A. Yes.

24 Q. Macy's, 900,000?

25 A. Yes.

1 Q. And Apple, 20,000?

2 A. Yes.

3 Q. These are real-world agreements that -- in  
4 which the '947 patent was licensed, correct?

5 A. They're real-world settlements of litigation,  
6 yes.

7 Q. They're real-world agreements in which the  
8 '947 patent was licensed, sir, correct?

9 A. Yes.

10 Q. Yes?

11 A. Yes.

12 Q. Okay. And -- but nevertheless, it's your  
13 opinion that in a hypothetical negotiation between Orion  
14 and Google, which it only involves one patent, doesn't  
15 involve purchase -- a non-exclusive license, what they  
16 call a bare license, it's your testimony that Google, in  
17 June of 2004, would have agreed to pay \$64 million,  
18 right?

19 A. No. I think I've said this several times.  
20 They would have agreed to a running royalty that as we  
21 sit here today, based on their revenues, would total \$64  
22 million.

23 Q. \$64 million?

24 A. Yes.

25 Q. Okay.

1 MR. VERHOEVEN: Let's go to DX Demo 72,  
2 please.

3 Q. (By Mr. Verhoeven) Now, this is another  
4 demonstrative exhibit that we have prepared, Dr. Becker,  
5 that concerns some agreements that Google was a party  
6 to.

7 In the interest of time, I'm not going to go  
8 through every single exhibit and bring it up and go  
9 through the terms. They're in your binder, if you need  
10 to look for them. But let's see if we can just do this  
11 in a more abbreviated form.

12 [REDACTED]

13 [REDACTED]

14 **REDACTED BY ORDER OF THE COURT**

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]



██████████

100

\_\_\_\_\_

\_\_\_\_\_

100

[illegible]

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Page 10 of 10

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Year	2010	2011	2012	2013	2014	2015
1	10	15	20	25	30	35
2	12	18	22	28	32	38
3	14	20	24	30	34	40
4	16	22	26	32	36	42
5	18	24	28	34	38	44
6	20	26	30	36	40	46
7	22	28	32	38	42	48
8	24	30	34	40	44	50
9	26	32	36	42	46	52
10	28	34	38	44	48	54
11	30	36	40	46	50	56
12	32	38	42	48	52	58
13	34	40	44	50	54	60
14	36	42	46	52	56	62
15	38	44	48	54	58	64
16	40	46	50	56	60	66
17	42	48	52	58	62	68
18	44	50	54	60	64	70
19	46	52	56	62	66	72
20	48	54	58	64	68	74
21	50	56	60	66	70	76
22	52	58	62	68	72	78
23	54	60	64	70	74	80
24	56	62	66	72	76	82
25	58	64	68	74	78	84
26	60	66	70	76	80	86
27	62	68	72	78	82	88
28	64	70	74	80	84	90
29	66	72	76	82	86	92
30	68	74	78	84	88	94
31	70	76	80	86	90	96
32	72	78	82	88	92	98
33	74	80	84	90	94	100
34	76	82	86	92	96	102
35	78	84	88	94	98	104
36	80	86	90	96	100	106
37	82	88	92	98	102	108
38	84	90	94	100	104	110
39	86	92	96	102	106	112
40	88	94	98	104	108	114
41	90	96	100	106	110	116
42	92	98	102	108	112	118
43	94	100	104	110	114	120
44	96	102	106	112	116	122
45	98	104	108	114	118	124
46	100	106	110	116	120	126
47	102	108	112	118	122	128
48	104	110	114	120	124	130
49	106	112	116	122	126	132
50	108	114	118	124	128	134
51	110	116	120	126	130	136
52	112	118	122	128	132	138
53	114	120	124	130	134	140
54	116	122	126	132	136	142
55	118	124	128	134	138	144
56	120	126	130	136	140	146
57	122	128	132	138	142	148
58	124	130	134	140	144	150
59	126	132	136	142	146	152
60	128	134	138	144	148	154
61	130	136	140	146	150	156
62	132	138	142			

\_\_\_\_\_

5

1 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

2

3 **REDACTED BY ORDER OF THE COURT**

4 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

5 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

6 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

7 [REDACTED] [REDACTED]

8 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

9 [REDACTED] [REDACTED]

10 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

11 [REDACTED] [REDACTED] [REDACTED]

12 [REDACTED] [REDACTED]

13 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

14 [REDACTED]

15 [REDACTED] [REDACTED]

16 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

17 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

18 [REDACTED] [REDACTED]

19 [REDACTED] [REDACTED]

20 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

21 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

22 [REDACTED] [REDACTED] [REDACTED]

23 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

24 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

25 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 **REDACTED BY ORDER OF THE COURT**

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 Q. Now, you've offered some testimony about a  
14 Stanford University license, correct?

15 A. Yes.

16 Q. If you would like to reference that, that's in  
17 your binder as Defendants' Exhibit 174.

18 The Stanford license agreement was entered  
19 into in 1998, right?

20 A. Yes.

21 Q. Would you agree with me that the internet was  
22 a completely different place in 1998 than it was in  
23 2004?

24 A. Yes. It was much smaller and had not yet sort  
25 of exploded the way it has today.

1 Q. And Google was much earlier in its life cycle  
2 in 1998?

3 A. Yes.

4 Q. And had it just been formed?

5 A. Yes.

6 Q. Google was only worth \$8 million back in 1998,  
7 right?

8 A. The -- there was a financing transaction at  
9 that point that put the value at --

10 Q. 8 million?

11 A. Yes.

12 Q. Okay. And as part of the Stanford license,  
13 there was a license to a patent application, right?

14 A. Correct.

15 Q. And that application resulted in six different  
16 patents, right?

17 A. I think as we sit here today, there have been  
18 that many patents, yes.

19 Q. A hypothetical negotiation between Orion and  
20 Google would be for one patent, right?

21 A. One issued patent, yes.

22 Q. And it would just be a non-exclusive license  
23 to just the patent, right?

24 A. Yes.

25 Q. No technology, right?

1           A.     Correct.

2           Q.     No employees?

3           A.     Correct.

4           Q.     Have no trademarks?

5           A.     Correct.

6           Q.     Okay.  Now, the Stanford license was an  
7 exclusive license, right?

8           A.     For a period of time.

9           Q.     Not a non-exclusive license?

10          A.     Correct.

11          Q.     And what Google got as part of the Stanford  
12 agreement was a lot more than just a bare, non-exclusive  
13 license patent, right?

14          A.     Yes.

15          Q.     Stanford also gave Google source code, right?

16          A.     Yes.

17          Q.     You didn't evaluate the value of the source  
18 code, did you, sir?

19          A.     Not specifically, no.

20          Q.     And Google received rights to the Google name  
21 and logo --

22          A.     Correct.

23          Q.     -- right?

24                 Trademarks, right?

25          A.     Yes.

1           Q.    And Google also received rights to technology  
2 for clustering and to split results into clusters of  
3 similar topics, right?

4           A.    Yes.

5           Q.    And Google also received a license for  
6 technology for scanning paper materials and indexing  
7 them, right?

8           A.    Yes.

9           Q.    Now, in the hypothetical negotiation, Google  
10 would know that Orion, the company Orion, doesn't have  
11 any -- besides the patents, doesn't have any technology,  
12 right?

13          A.    Correct.

14          Q.    They don't have employees that built an  
15 embodiment of the patent, do they?

16          A.    Correct.

17          Q.    They don't have people that write code, right?

18          A.    At least not that I'm aware of at that time.

19          Q.    Okay. They don't have trademarks that they're  
20 licensing, right?

21          A.    Correct.

22          Q.    So it's fair to say, sir, isn't it, that the  
23 Stanford license agreement is much more than just a bare  
24 patent license; it's a non-exclusive license?

25          A.    Yes.

1           Q.     Okay.  Now, I'd like to conclude by going to  
2 DX Demo 55.

3                   Have you seen this document before or this  
4 illustration before, sir?

5           A.     I believe I have.  I've seen one like it.

6           Q.     This was up when I was cross-examining  
7 Dr. Rhyne.

8                   Were you in the courtroom for that?

9           A.     Yes.

10          Q.     Did you hear Dr. Rhyne say that when a user  
11 clicks on ads that that is outside of infringement?

12          A.     Yes.

13          Q.     Said it's irrelevant to infringement, right?

14          A.     That's correct.

15          Q.     So this act of clicking on the ad, you're  
16 not -- you're not the infringement expert, right?

17          A.     That's correct.  I'm not.

18          Q.     But you had heard Dr. Rhyne say this act of  
19 clicking on the ad is non-infringing, right?  It's  
20 interactive?

21          A.     I heard him say that that doesn't -- that's  
22 beyond the steps that are necessary for infringement.

23          Q.     Now, isn't it true that every single penny  
24 that Google has made that you used in your royalty  
25 analysis comes from clicking on ads?



1 A. Yes.

2 Q. And that's the very action that Dr. Rhyne says  
3 is not infringing?

4 A. That's correct.

5 MR. VERHOEVEN: No further questions,  
6 Your Honor.

7 THE COURT: All right. Thank you,  
8 Counselor.

9 Mr. Rooklidge.

10 CROSS-EXAMINATION

11 BY MR. ROOKLIDGE:

12 Q. Good morning, Dr. Becker.

13 A. Good morning.

14 Q. Your approach to writing your damages report  
15 relating to Yahoo! was the same as your approach to  
16 writing your damages report relating to Google, correct?

17 A. Yes.

18 Q. And the substantive analysis that you did for  
19 Yahoo! in that report was the same as the substantive  
20 analysis you did for Google, correct?

21 A. It was very similar. It wasn't identical.

22 Q. And currently, as we sit here today, you  
23 cannot identify an agreement that demonstrates that  
24 Yahoo! has paid a quarter to a half percent of its  
25 revenue for a patent license under a single patent,

1 correct?

2 A. Correct.

3 Q. You talked yesterday about the hypothetical  
4 negotiation under the Georgia-Pacific Factors.

5 Do you recall that?

6 A. Yes.

7 Q. And you considered in your report in  
8 connection with Yahoo!, in connection with Factor 2 of  
9 the Georgia-Pacific Factors, the Overture patent  
10 portfolio.

11 Do you recall that?

12 A. Yes.

13 Q. Now, Factor 2 is, and I quote: The rates paid  
14 by the licensee for the use of other patents comparable  
15 to the patent-in-suit, end of quote.

16 A. Yes.

17 Q. Now, Yahoo!, in this hypothetical negotiation  
18 that's going on here, is the licensee, correct?

19 A. Yes.

20 Q. But Yahoo! was not the licensee for the  
21 Overture patent portfolio licenses, correct?

22 A. Correct.

23 Q. Yahoo! was the licensor?

24 A. Correct.

25 Q. That means that Yahoo! was licensing the

1 patents out to someone else, correct?

2 A. That's correct.

3 Q. Okay. In other words, in those circumstances,  
4 Yahoo! wasn't paying money; it was receiving money?

5 A. That's correct.

6 Q. Now, at the time of the hypothetical  
7 negotiation, which is just before the April 2004 date of  
8 first infringement, Yahoo! had an up and running  
9 business and a very successful Sponsored Search program,  
10 correct?

11 A. Yes, it did.

12 Q. Now, Yahoo! acquired the Sponsored Search  
13 product from a company called Overture, right?

14 A. Yes.

15 Q. And Overture had developed an entire portfolio  
16 of patents around that Sponsored Search product, hadn't  
17 it?

18 A. Yes.

19 Q. And the Over -- the Overture patent portfolio  
20 and the technology that that portfolio covered was the  
21 basis for the Sponsored Search system that Yahoo! began  
22 using from Overture back in 2001, correct?

23 A. Yeah, I think that's a fair statement.

24 Q. Now, you relied yesterday on the Overture  
25 patent portfolio licenses for setting a 3.75 to

1 5 percent upper limit on the reasonable royalty for  
2 Yahoo!, correct?

3 A. Yes, I think that's a fair statement, although  
4 I -- in -- in setting that, it's -- it's a data point  
5 that right when I said it, there's a recognition that  
6 there has to be an adjustment down, because that  
7 represents a portfolio.

8 So I would never suggest that the '947 Rice  
9 patent would be at that upper limit of 3.75 to 5.

10 Q. Right. And that Overture patent portfolio  
11 considers not just the initial patent applications that  
12 were filed, but extensions, divisions, foreign  
13 counterparts, continuations, divisionals, continuations  
14 in part?

15 A. Yes, absolutely.

16 Q. And -- and those other patents, including  
17 foreign counterparts and extensions, may well have  
18 separate economic value from the original patent in the  
19 family, correct?

20 A. They may.

21 Q. Now, even though the Overture patent portfolio  
22 licenses contain many patents, you never checked to  
23 determine how many, correct?

24 A. No. At the time that I did my analysis, I  
25 recognized that it was a portfolio of patents, and the

1 number of patents was not relevant.

2 Q. And you didn't perform any analysis of that  
3 Overture patent portfolio to determine how the values of  
4 the various patents compare to each other or to  
5 determine if the patents in that portfolio, if any of  
6 those patents are more valuable than any of the others?

7 A. No, I didn't perform any technical analysis.  
8 I think I indicated in my report that there seems to be  
9 a general recognition in the industry that the '361  
10 patent is kind of the kingpin of that portfolio.

11 But beyond that, I didn't do an analysis of  
12 one patent versus another. I looked at the portfolio as  
13 a whole.

14 Q. And you admitted on your direct yesterday that  
15 the Overture patent portfolio was much broader than the  
16 '947 patent that's involved in this case, correct?

17 A. Yes.

18 Q. Now, you admit that you need to make a big  
19 downward adjustment from the royalty rates in the  
20 Overture portfolio to arrive at a rate for the  
21 incremental contribution in this case, correct?

22 A. Yes.

23 Q. And you said yesterday that you considered a  
24 number of factors in making that downward adjustment,  
25 right?

1           A.     Yes.

2           Q.     You said you considered that Yahoo!'s  
3 Sponsored Search is a very popular service, right?

4           A.     Yes.

5           Q.     But Yahoo! Sponsored Search was a very popular  
6 service back well before the April 2004 hypothetical  
7 negotiation date, wasn't it?

8           A.     It was popular, not nearly as popular as it  
9 has become, or it became after April 2004.

10          Q.     Now, you said that you considered Yahoo!'s  
11 Sponsored Search to be a profitable service, didn't you?

12          A.     Yes.

13          Q.     Now, Yahoo!'s Sponsored Search service was a  
14 profitable service for Yahoo! back before the April 2004  
15 hypothetical negotiation date, correct?

16          A.     Yes.

17          Q.     Now, you said that you considered the benefits  
18 and the extent of use of the '947 patent, but you didn't  
19 quantify those benefits and extent of use, did you?

20          A.     I did not -- I would agree that I didn't  
21 quantify the -- the benefits specifically.

22                 The extent of use, I do have some  
23 quantification to that in the sense the royalty base  
24 quantifies the extent of use.

25          Q.     But you haven't placed any dollar numbers on

1 the benefits of the '947 patent to Yahoo!, have you?

2 A. Not beyond my ultimate royalty rate, if any.

3 Q. Okay. And you said yesterday that you had  
4 considered advertisement, quality, and relevance in  
5 connection with your downward adjustment, correct?

6 A. Well, in connection with setting my overall --  
7 reaching my overall opinion, the importance of relevance  
8 was something I considered.

9 Q. But you didn't qualify in dollar terms how the  
10 '947 patent affects Yahoo!'s ad quality or relevance,  
11 did you?

12 A. That's correct. We don't have a specific  
13 quantification of the impact of the '947 in a precise  
14 way.

15 Q. You didn't do any specific economic  
16 quantification that led you to bring the royalty rate  
17 down to a quarter to a half a percent, correct?

18 A. Not any specific quantification. It was a  
19 consideration of all the relevant Georgia-Pacific  
20 Factors together to get to that rate.

21 Q. You didn't use any complicated formulas or any  
22 demand curves or economic analysis to -- to reach  
23 that -- that conclusion?

24 A. I would agree with that. We don't have any  
25 specific -- there's no complicated formulas here. This

1 is a situation where we don't have specific testing  
2 data, for example, related to the '947. So I would  
3 agree with that.

4 Q. Yesterday on direct, you testified about the  
5 benefits of the '947 patent.

6 Do you recall that?

7 A. Yes.

8 Q. And you haven't offered an opinion that either  
9 Yahoo!'s or Google's alleged use of the '947 patent is  
10 the reason -- the reason that customers use their search  
11 engines?

12 A. No. I think I have offered evidence that  
13 customers -- there's -- there's specific evidence I've  
14 cited that the relevance is one of the factors that  
15 drives people to use a particular search engine?

16 And relevance is one of the factors that  
17 drives people to respond to ads. But beyond noting and  
18 providing evidence of the connection between customers'  
19 demand for relevance in general, I haven't provided any  
20 evidence that specifically ties that to the '947 patent.

21 I'm relying on Dr. Rhyne's analysis or his  
22 providing me with the understanding that the '947 patent  
23 is providing tools or enhancement to the relevance.

24 Q. You haven't offered an opinion that either  
25 Yahoo!'s or Google's use of the '947 patent is the sole



1 reason that advertisers bid for ads on either Sponsored  
2 Search or AdWords, correct?

3 A. That's correct.

4 Q. And you've admitted that Yahoo!'s and Google's  
5 use of the '947 patent is an incremental improvement to  
6 their system?

7 A. Yes.

8 Q. The '947 patent is an improvement patent,  
9 correct?

10 A. Yes.

11 Q. Now, you've -- you've had to rely on  
12 Dr. Rhyne's opinion about the scope of the invention of  
13 the '947 patent, correct?

14 A. Yes.

15 Q. Okay. And you're aware that Dr. Rhyne has  
16 testified that the '947 patent did not disclose a new  
17 method of normalization?

18 A. I recall that, yes.

19 Q. And you're aware that Dr. Rhyne has testified  
20 that the patent did not come up with new techniques for  
21 flagging attributes?

22 A. Yes.

23 Q. And you agree that the incremental  
24 contribution of a patent can be informed by a review of  
25 the prior art?

1           A.     It can be, yes.

2           Q.     And you've not taken any steps to identify  
3 what distinguishes the '947 patent's claimed invention  
4 from the prior art?

5           A.     That's correct.

6           Q.     And you're not able to express an opinion  
7 about what distinguishes the '947 patent's claimed  
8 invention from the prior art?

9           A.     Correct.

10          Q.     In fact, you don't have an understanding of  
11 exactly what the '947 patent even adds to the prior art?

12          A.     That was outside the scope of my analysis.

13          Q.     So you've never precisely quantified the  
14 incremental benefit of the '947 patent over the prior  
15 art?

16          A.     Correct.

17          Q.     And you don't specifically quantify the  
18 increase in revenue or profits to either Yahoo! or  
19 Google from using the '947 patent to increase the  
20 relevance of its ads?

21          A.     Correct.

22          Q.     You've not taken into consideration the extent  
23 to which the prior art techniques that are used by  
24 Yahoo! and Google improve the relevance and, therefore,  
25 the value of the advertisements served by either Yahoo!

1 or Google?

2 A. Well, I -- I think I have taken into account  
3 that there are many other factors that are improving --  
4 contributing to the success of each company's systems,  
5 but I haven't specifically quantified the -- you know,  
6 that versus the '947 patent.

7 Q. And you've never quantified the degree of  
8 greater relevance that's contributed to either Yahoo! or  
9 Google by using the '947 patent?

10 A. That's correct.

11 Q. Now, the claimed invention in the '947 patent  
12 isn't the only way to improve the relevance of  
13 advertisements, is it?

14 A. My understanding of the way these systems  
15 works is that there's other steps that are taken that  
16 also contribute to the relevance.

17 Q. And Yahoo! has its own patents on those steps  
18 that contribute to the relevance, correct?

19 A. Sure. Yes.

20 Q. And you were here in the courtroom when I  
21 asked Dr. Rhyne about the fact that Yahoo! has patents,  
22 for example, on geo-targeting, correct?

23 A. Yes.

24 Q. And I referred to Defendants' Exhibit 745 and  
25 759.

1           A.     Yes.    I was here for that.

2           Q.     And you were also here when I discussed with  
3 Dr. Rhyne the fact that Yahoo! has its own patents on  
4 canonicalization, expressly Defendants' Exhibit 676 and  
5 674?

6           A.     I'll agree, if I don't have to say that word.

7           Q.     I wouldn't put you through that.

8           A.     Thank you.

9           Q.     It took me long enough to learn that.

10                  Now, your Slide 83 --

11                         MR. VERHOEVEN:  If we could put up your  
12 Slide 83 from yesterday.

13           Q.     (By Mr. Verhoeven) This is a slide you used in  
14 direct testimony, suggested that Yahoo!'s use of the  
15 '947 patent improved Yahoo!'s speed in returning search  
16 results.

17                         Do you recall that?

18           A.     I guess I -- on this slide, are you asking me  
19 did I testify that this slide is representing that speed  
20 is a factor?

21           Q.     Well, yesterday at all, did you represent that  
22 speed is a factor?

23           A.     I had another slide that said that speed  
24 mattered to customers, but this slide isn't the one that  
25 I showed that had anything to do with speed.

1           Q.     Unfortunately, my numbers were different from  
2 the numbers that Plaintiff's counsel was using.

3                     But you will agree with me that the '947  
4 patent has absolutely nothing to do with the speed that  
5 the native search results are returned, correct?

6           A.     That's correct.

7           Q.     And both Yahoo! and Google have many  
8 techniques for improving the speed and returning the  
9 native advertising search results, correct?

10          A.     Yes.

11          Q.     And Yahoo! has patents on its techniques for  
12 improving the speed of returning its native search --  
13 search advertising results?

14          A.     Yes.

15          Q.     Okay. Now, once again, you haven't discussed  
16 with Dr. Rhyne any -- any patents in the Overture  
17 portfolio, other than the '361 patent, correct?

18          A.     That's correct.

19          Q.     And you haven't discussed with Dr. Rhyne --

20                     (Cell phone ringing.)

21          Q.     (By Mr. Verhoeven) You haven't discussed with  
22 Dr. Rhyne any other Yahoo! patents besides the Overture  
23 portfolio, correct?

24          A.     Correct.

25          Q.     Now, Yahoo! has made a number of non-patented

1 contributions to its Sponsored Search service, hasn't  
2 it?

3 A. Yes.

4 Q. One of those contributions is the fact that  
5 Yahoo! was commercially successful before April of 2004,  
6 correct?

7 A. That's correct.

8 Q. And another of those contributions was that  
9 before April of 2004, Yahoo! was the second-ranked  
10 search engine, correct?

11 A. Yes.

12 Q. And another of those contributions is that  
13 Yahoo! has made investments to enhance its software and  
14 hardware infrastructure continuously since before April  
15 2004, correct?

16 A. Yes.

17 Q. And another contribution is the fact that  
18 Yahoo! was going out and acquiring businesses, for  
19 example, Overture and its Sponsored Search technology in  
20 business, correct?

21 A. That's correct.

22 Q. Another one of Yahoo!'s contributions was the  
23 acquisition of companies related to popular social  
24 networking sites?

25 A. Yes.

1           Q.    And so Yahoo! brings a lot to the table in  
2 terms of contributions to the success of Sponsored  
3 Search, including its methods for driving traffic to  
4 Yahoo! search pages?

5           A.    Yes.

6           Q.    And the same holds true for Google, correct?

7           A.    Yes.

8           Q.    Now, you've not done any quantitative analysis  
9 of Yahoo!'s and Google's contribution to improving the  
10 relevance and, therefore, the value of the  
11 advertisements, correct?

12          A.    Not any specific quantification. I think I  
13 outlined in my direct the considerations that I made in  
14 the George -- Georgia-Pacific Factor analysis, which  
15 included some quantitative considerations but nothing  
16 specific in terms of a direct measurement of the  
17 contribution.

18          Q.    Now, the economic benefit to Yahoo! and Google  
19 is supposed to be the focus of your analysis, at least  
20 from the side of Yahoo! and Google in this hypothetical  
21 negotiation, correct?

22          A.    Yes.

23          Q.    And your analysis is supposed to focus, in  
24 part, on what Yahoo! and Google gained by having the  
25 rights to practice the '947 patent that would result

1 from this hypothetical negotiation?

2 A. Yes.

3 Q. Now, the revenue base that you used in your  
4 calculation was all of the revenue from Yahoo!'s  
5 Sponsored Search and Google's AdWords, correct?

6 A. Yes.

7 Q. And you didn't perform any apportionment of  
8 that royalty base for either Yahoo! or Google, did you?

9 A. I didn't take a subset of that revenue and say  
10 this subset is going to be the royalty base. It is  
11 accounted for in the form of the running royalty being  
12 at the level that it is.

13 Q. Let's go back to the royalty base. Let's  
14 focus on my question.

15 My question was, you didn't perform any  
16 apportionment of the royalty base for either Yahoo! on  
17 or Google?

18 A. Not of the base, no.

19 Q. Now, you agree that a determination of a  
20 reasonable royalty for the '947 patent must recognize  
21 that Yahoo! and Google should be credited with the  
22 elements of the success of the accused products that are  
23 not patented and that they brought to the table?

24 A. Yes.

25 Q. And you agree in the hypothetical negotiation



1 with Orion back in April of 2004, July of 2004, that  
2 both Yahoo! and Google brought a vast array of  
3 technical, intellectual, and financial assets to bear in  
4 creating their highly successful business models?

5 A. I do agree with that.

6 Q. In fact, you stated that in your report,  
7 right?

8 A. Yes.

9 Q. And you agree that the '947 patent does not  
10 describe an entire search engine?

11 A. It doesn't even talk about search. It's  
12 certainly not an entire search engine.

13 Q. Okay. And you agree that both Yahoo! and  
14 Google had successful internet search and advertising  
15 businesses back before the date that Bright  
16 Response's -- Bright Response alleges that they began  
17 infringing the '947 patent?

18 A. Yes.

19 Q. Now, at the time of the hypothetical  
20 negotiation, you said in your report that Google was a  
21 top-ranked search engine and Yahoo! was number two,  
22 correct?

23 A. Yes.

24 Q. And the fact that they provide highly relevant  
25 search results is important to the success of Yahoo!'s

1 Sponsored Search system and Google's AdWords system,  
2 correct?

3 A. It -- it is a driver, because it helps drive  
4 traffic to those search pages.

5 Q. And, in fact, those search functions, the  
6 native search functions of both Yahoo! and Google, are a  
7 more important contributor than the '947 patent to the  
8 success of those systems, correct?

9 A. Well, certainly to the success of their search  
10 products. There's a less direct impact on the success  
11 of the ad products. But without the search traffic, you  
12 wouldn't have any ads, so I think that's a fair  
13 statement.

14 Q. And just like you didn't quantify the degree  
15 of greater relevance that's contributed by the '947  
16 patent to Yahoo!, you didn't quantify that for Google  
17 either, did you?

18 A. Correct.

19 Q. And just like you didn't quantify the increase  
20 in revenue to Yahoo! from using the '947 patent, you  
21 didn't quantify the increase in revenue from using the  
22 '947 patent to Google, correct?

23 A. Not a quantification in isolation, no.

24 Q. And, likewise, for neither Yahoo! nor Google  
25 did you quantify the increase in profit from using the

1 '947 patent, correct?

2 A. That -- that would follow from that, yes.

3 Q. And you didn't perform a market survey to  
4 measure the benefits of the '947 patent to either Yahoo!  
5 or Google, correct?

6 A. Well, I did look at market research on the  
7 importance in the -- in the -- to search engine users of  
8 the importance of relevance, and the '947 contributes to  
9 relevance.

10 But, again, I -- as to a sort of specific test  
11 of -- if you peel out just the '947, we don't have the  
12 benefit of that kind of data.

13 Q. Now, you discussed earlier this morning with  
14 Mr. Verhoeven that Google's AdWords revenue all comes  
15 from users clicking on advertisements.

16 Do you recall that?

17 A. Yes.

18 Q. Okay. Now, likewise, you know that Yahoo!  
19 Sponsored Search revenue all comes from users clicking  
20 on advertisements, correct?

21 A. Yes.

22 Q. Okay. And you have based your royalty  
23 calculations against Yahoo! solely on the revenue that  
24 Yahoo! has received from users clicking on  
25 advertisements, correct?

1           A.     Yes.  Ultimately, those ads that are displayed  
2 get clicked on, and that's the revenue-generating  
3 source.

4           Q.     Okay.  And you were in the courtroom yesterday  
5 when Dr. Rhyne admitted that clicking on Yahoo!'s  
6 Sponsored Search advertisements does not infringe any  
7 claims of the '947 patent, correct?

8           A.     That's correct.

9           Q.     Okay.  So the revenue base on which you are  
10 relying for your damages calculation against Yahoo! is  
11 based on a non-infringing act, correct?

12          A.     Well, I wouldn't agree with that.

13                 The revenue is -- there's an infringing act  
14 that -- that is involved in the process of putting those  
15 ads up there.  If you didn't have the ad, there wouldn't  
16 be an ad to click on.

17                 It's the same as saying, if you have an  
18 infringing process to make a running shoe and it's  
19 sitting on the shelf at Wal-Mart, but the claims of the  
20 patent for this -- how to make this running shoe don't  
21 describe the act of walking to the cash register and  
22 checking out and actually paying for the shoe, sure, the  
23 claims don't cover the act of turning that into a sale.

24                 But if you had a royalty base of sales of  
25 shoes, it would still relate to the infringing act.

1           Q.     But, Dr. Becker, let's go back to my question.  
2     There is no -- there is no revenue unless the user  
3     clicks on the -- on the advertisement that's returned by  
4     Sponsored Search, correct?

5           A.     Yeah.   There's no revenue unless someone  
6     clicks on one of the infringing ads.

7           Q.     And that's a -- that by itself is a  
8     non-infringing act, correct?

9           A.     Absolutely.

10          Q.     All right.   Now, you don't dispute that Yahoo!  
11     has been providing its Sponsored Search service since  
12     2001.

13          A.     That's correct.   I don't dispute that.

14          Q.     And the Sponsored Search service that Yahoo!  
15     was using back in 2001 is not accused of infringement in  
16     this case.

17          A.     That's correct.

18          Q.     Now, in 2003, Yahoo! purchased Over --  
19     Overture, who had been providing to Yahoo! the equipment  
20     and the mechanism to provide its Sponsored Search  
21     system, correct?

22          A.     Yes.

23          Q.     Okay.

24          A.     Yes.

25          Q.     And -- but you and Dr. Rhyne both say that the

1 date of first infringement didn't occur until the next  
2 year, April of 2004, correct?

3 A. Correct.

4 Q. You don't know what, if anything, Yahoo! did  
5 to change its March 2004 Sponsored Search service into  
6 its April 2004 Sponsored Search service to turn it from  
7 a non-infringing service to an infringing service, do  
8 you?

9 A. I don't know what that system prior to April  
10 2004 was in any specific way. That's outside the scope  
11 of my work, to look at that system.

12 Q. And you didn't ask Dr. Rhyne about the  
13 apparent inconsistency between his belief that the '947  
14 patent is core to Yahoo!'s Sponsored Search and his  
15 assertion that the date of first infringement was April  
16 of 2004, which was three years after Yahoo! had begun  
17 offering Sponsored Search.

18 A. That's correct.

19 Q. And you didn't ask Dr. Rhyne about the  
20 apparent inconsistency between his belief that there are  
21 no viable alternatives to the '947 patent and the fact  
22 that Yahoo! wasn't using the '947 patent before April  
23 2004.

24 A. Well, I didn't ask him about the pre-April  
25 2004 thing. I don't agree that it's an inconsistency,

1 but I didn't ask him about the pre-April 2004 system.

2 Q. Let's go to the issue of lump sum versus  
3 running royalty.

4 You mentioned yesterday that Yahoo!'s  
5 licensing attorney, Luke Yeh, testified that Yahoo!  
6 doesn't have a policy or a preference for lump-sum  
7 agreements when taking licenses on other companies'  
8 patents, correct?

9 A. Correct.

10 Q. Okay. And you used a slide in connection with  
11 that, which I believe is Slide 68. We'll see if that's  
12 the slide. Great. That's the slide.

13 Do you recall that slide?

14 A. Yes, I recall this slide.

15 Q. Okay. And this slide quotes from the  
16 deposition transcript of Mr. Yeh, correct?

17 A. Yes.

18 Q. All right. Now, you didn't read the entire  
19 transcript of the deposition of Mr. Yeh, who was  
20 Yahoo!'s licensing attorney that testified about  
21 licensing, correct?

22 A. Right. Not every word of it, no.

23 Q. Okay. Now, Mr. Yeh described a number of  
24 factors that favor the use of lump-sum royalty over a  
25 running royalty, correct?

1           A.     Yes. I did read that part of his deposition.

2           Q.     Okay. And one of the factors that Mr. Yeh  
3 explained favors a lump-sum royalty over a running  
4 royalty is that Yahoo! does not like to disclose to  
5 licensors any revenue figures for any specific services  
6 other than the figures that it has to disclose to the  
7 Securities and Exchange Commission, correct?

8           A.     Correct.

9           Q.     Okay. And Yahoo! does not have to disclose to  
10 the SEC the revenue figures that you use in your  
11 analysis as accused revenue, correct?

12          A.     That's correct.

13          Q.     Okay. Now, let's take a look back up here at  
14 Slide 68. Let me get my pointer.

15                 Now, we see here in the second excerpt here,  
16 the question was: Does Yahoo! have a preferred  
17 preference for a lump-sum form of royalty in the license  
18 that it negotiates?

19                 And then we see an answer: From my knowledge  
20 or my experience with the company, Yahoo! doesn't have  
21 any preference with regard to in-licenses, period.

22                 Do you see that?

23          A.     Yes.

24          Q.     Okay. And then it goes on actually to another  
25 answer where he's talking about out-licenses, right?



1           A.     Yes.

2           Q.     Okay.   So in-licenses are where Yahoo! is  
3 taking a license from another company and paying them  
4 money, correct?

5           A.     Yes.

6           Q.     And out-licenses is where Yahoo! is providing  
7 a license on its patents to another company and  
8 receiving money, correct?

9           A.     That's correct.

10          Q.     The hypothetical negotiation in this case,  
11 Yahoo! is in the position -- or would be in the position  
12 of taking an in-license, correct?

13          A.     I agree with that, yes.

14          Q.     Yahoo! would be receiving a license to the  
15 '947 patent for Orion and giving Orion money, correct?

16          A.     Yes.

17          Q.     Okay.   So the most relevant portion of his  
18 answer up here is this section right here (indicates).  
19 From my knowledge or my experience with the company,  
20 Yahoo! doesn't have any preference with regard to  
21 in-licenses.

22                   Do you see that?

23          A.     I see that.

24          Q.     Okay.   And that was the end of his answer with  
25 respect to in-licenses, right?

1           A.    You know, I'd have to see the whole transcript  
2 to see whether --

3           Q.    Well, why don't we put up that transcript, and  
4 let's take a look at that section and see what he says.

5                   Here's where we're talking, whether Yahoo! has  
6 a preference for a lump-sum form of royalty.

7                   I, from my knowledge or experience with the  
8 company, Yahoo! doesn't have any preference with regard  
9 to in-licenses.

10                  That's the end of your quote on the slide,  
11 isn't it?

12           A.    Right, because I'm quoting the --

13           Q.    Right?

14           A.    -- his statement about their preference, not  
15 their practice.

16           Q.    Right. So then we go on -- this is the point  
17 that was cut out of your slide, wasn't it?

18                   It says: But I will add that as far as I know  
19 or as far I'm aware, Yahoo! has only entered into  
20 lump-sum in-licenses.

21                   Do you see that?

22           A.    That's correct. They have.

23           Q.    Why did you delete the rest of his answer from  
24 your slide?

25           A.    Because the point I was making was about their

1 preference and policy, not the practice.

2 Q. In other words, their preference or policies,  
3 not what they actually do in practice?

4 A. Well, what they have actually done -- I've  
5 certainly reviewed all their licenses, and we've  
6 discussed those licenses, that the ones that have been  
7 produced in this litigation, by and large, on an  
8 in-licensing basis are lump sum.

9 Q. Yesterday you mentioned the VPS license and  
10 suggested in your testimony that it implied that Yahoo!  
11 would pay a running royalty of 1 to 3 percent.

12 Do you recall that?

13 A. I recall that section of my testimony, and I  
14 don't agree that I implied that they would -- that that  
15 said they would pay a running royalty; I think I said  
16 that it indicated that in setting the lump sum, there  
17 was a running royalty component used.

18 Q. Yahoo! never agreed to pay 1 to 3 percent  
19 under the VPS license, did it?

20 A. That's correct. They didn't. That was an  
21 optional part of that agreement.

22 Q. That agreement was, in fact, a lump-sum  
23 license, wasn't it?

24 A. Yes. Even the portion that talked about the 1  
25 to 3 percent would have been -- if they had exercised

1 that option, they would have gone through the running  
2 royalty math and then paid a single amount.

3 Q. Yahoo! agreed to pay a lump sum in that  
4 agreement of \$450,000, correct?

5 A. Correct.

6 Q. Okay. And that was not just for one patent,  
7 was it?

8 A. That's correct. It was for a number of  
9 patents.

10 Q. It was for two patents and all related U.S.  
11 and foreign patents and applications, correct?

12 A. Correct.

13 Q. Now, yesterday Mr. Verhoeven established with  
14 you that Orion, the party to the hypothetical  
15 negotiation with Yahoo!, bought the '947 patent, along  
16 with 13 other patents and seven patent applications, for  
17 a million dollars in January of 2004, correct?

18 A. Correct.

19 Q. Okay. And so that was just three months  
20 before the hypothetical negotiation with Yahoo!,  
21 correct?

22 A. Yes.

23 Q. And you concede, don't you, that during that  
24 hypothetical negotiation with Orion, Yahoo! would have  
25 known about that purchase agreement, correct?

1           A.     Yes.

2           Q.     Okay.  Now, Mr. Verhoeven went on to review  
3 with you a number of license agreements, both yesterday  
4 and today, that related to Orion or otherwise to the  
5 '947 patent, correct?

6           A.     Yes.

7           Q.     And the parties to the Yahoo!/Orion  
8 hypothetical negotiation would be assumed to have known  
9 about those agreements as well, correct?

10          A.     Yes.

11          Q.     And that includes DX157, the agreement under  
12 which Apple received a lifetime covenant not to sue  
13 under the '947 patent for \$20,000.

14          A.     Yes.

15          Q.     Now, you said in Paragraph 90 of your report  
16 that you didn't rely on any of the Yahoo! settlement  
17 agreements, correct?

18          A.     Correct.

19          Q.     And you said in Paragraph 58 of your report  
20 that you didn't rely on any of the Bright Response  
21 agreements that licensed the '947 patent, correct?

22          A.     Correct.

23          Q.     And you didn't rely on any of the Orion  
24 settlement agreements, correct?

25          A.     Correct.

1           Q.    And you didn't rely on the Keystone agreement  
2 of the '947 patent, correct?

3           A.    That's correct.

4           Q.    And you didn't rely on any of the prior  
5 license agreements that cover the '947 patent, correct?

6           A.    Correct.

7                   And I -- let me just amend that to say, when  
8 I'm saying correct, in terms of relying, they don't end  
9 up being relevant to the setting of the rate in the  
10 negotiation.

11                   I certainly relied on them in the form of --  
12 in the sense that I considered all of them in doing my  
13 analysis and ultimately reached the conclusion -- with  
14 respect to each of the categories of agreements that  
15 you've just mentioned, reached the conclusion that they  
16 were not relevant to the circumstances of the  
17 hypothetical negotiation and the setting of the rate.

18           Q.    And those agreements could be relevant to  
19 indicate different things in a reasonable royalty  
20 analysis, correct?

21           A.    Sure.

22           Q.    For example, in addition to the royalty rate,  
23 they could also be relevant to the form of the payment  
24 of the agreement, correct?

25           A.    Yes, they can.

1           Q.    So, in other words, all these agreements, even  
2 apart from the amount of payment, could be relevant to  
3 whether the parties would have entered into a lump sum  
4 or a running royalty form, correct?

5           A.    Other agreements could. But I have  
6 consistently taken the position that I don't think  
7 settlement agreements even inform the form of royalty.

8           Q.    But as to the rate of those settlement  
9 agreements, every single one of those settlement  
10 agreements that cover the '947 patent were entered into  
11 for less than the cost of the -- defending the lawsuit  
12 being settled, correct?

13          A.    I think I've testified that I don't know what  
14 the cost of those litigations were, but they were  
15 entered into for the amounts that we talked about.

16          Q.    Let's -- let's go back to your deposition  
17 transcript of July 22nd, 2010, Page 219, Lines 22  
18 through Page 220, Line 22.

19                   THE COURT: Hold on just a second.

20                   Counsel approach.

21                   (Bench conference.)

22                   THE COURT: What's the deposition clip  
23 going to address?

24                   MR. ROOKLIDGE: He's going to eventually  
25 concede that those agreements were entered into for less

1 than the cost of defending the lawsuit.

2 This is my last question.

3 THE COURT: Well, let's -- let's -- I'm  
4 not going to get into what the relevant cost is of  
5 defending lawsuits, because I'm not going to let you get  
6 into what amount of money you guys have put in defending  
7 this lawsuit.

8 They have -- I mean, we're not going to  
9 address the cost in an unrelated case. We don't have  
10 any foundation of what was involved in those cases, the  
11 extent of infringement, or anything.

12 So wind it up.

13 MR. ROOKLIDGE: This was going to be my  
14 last question, Your Honor.

15 THE COURT: Well, then you wind it up  
16 without playing a clip that discusses what the relative  
17 cost of other cases -- defending other cases is.

18 (Bench conference concluded.)

19 MR. ROOKLIDGE: Pass the witness.

20 THE COURT: Thank you, Mr. Rooklidge.

21 REDIRECT EXAMINATION

22 BY MR. HUESTON:

23 Q. Good morning, Dr. Becker.

24 A. Good morning.

25 MR. HUESTON: Let's put up Slide 48,



1 please.

2 And as they do that, I'll grab my water.

3 Q. (By Mr. Hueston) Defense counsel, both of  
4 them, went over some settlement agreements with  
5 licenses?

6 A. Yes.

7 Q. Lawsuit settlement agreements, right?

8 A. Yes.

9 Q. And they included a Banter agreement for about  
10 \$150,000?

11 A. Yes.

12 Q. And Kana for a million?

13 A. Yes.

14 Q. And Black & Decker, 650,000?

15 A. Yes.

16 Q. Whirlpool, 1.5 million?

17 A. (No response.)

18 Q. Yes?

19 A. Yes.

20 Q. Macy's, about 900,000?

21 A. Yes.

22 Q. They showed a little chart where everything is  
23 about a million or less or a million-and-a-half or less,  
24 right?

25 A. Yes.

1           Q.     All right. Now, let me show you a few that  
2 the Defense didn't reveal to you and the jury.

3                   MR. HUESTON: Let's take a look at  
4 Defendants' Exhibit 406. If you can pull that up,  
5 please. See if you can pop it up on the screen.

6           Q.     (By Mr. Hueston) Okay. Take a look at that,  
7 Dr. Becker. Are you familiar with this? Is this one of  
8 the --

9           A.     Yes, I'm familiar with this agreement.

10          Q.     All right. One of the ones you viewed --  
11 viewed in that long list of settlement agreements that  
12 you reviewed on direct examination?

13          A.     Yes.

14          Q.     All right. And this is between Triton and  
15 SAP, a company named SAP, right?

16          A.     Yes.

17                   MR. HUESTON: Let's go to Page 7 of that  
18 agreement.

19          Q.     (By Mr. Hueston) That's the consideration  
20 section or what's paid, and what's the amount of money  
21 there on this agreement?

22          A.     4,625,000.

23          Q.     All right. And that also was for a group of  
24 patents, correct?

25          A.     Yes.

1           Q.     But the 4,600,000 is a lot higher than the  
2 ones you saw from defense counsel, right?

3           A.     Yes.

4           Q.     All right.

5                   MR. HUESTON:   Let's go to Defense Exhibit  
6 405.

7           Q.     (By Mr. Hueston) And this is an agreement with  
8 Oracle Corporation. Do you remember looking over that  
9 one between Triton and Polaris and Oracle?

10          A.     Yes.

11          Q.     And let's go -- there it is. Is that it right  
12 there, Defense Exhibit 405, a lawsuit settlement  
13 agreement with Oracle?

14          A.     Yes.

15          Q.     Okay.

16                   MR. HUESTON:   Let's go to Page 6 of this  
17 agreement, which has the amount of money under the  
18 consideration section.

19          Q.     (By Mr. Hueston) And what's the amount of  
20 money here?

21          A.     \$5 million.

22          Q.     Okay. And just to make sure we're fair, this  
23 involved a group of patents as well, a number of the  
24 patents, right?

25          A.     Yes.

1           Q.    All right.  The 5 million is a lot higher than  
2 the ones they showed you, right?

3           A.    Yes.

4           Q.    All right.  And one last example.

5                   MR. HUESTON:  Let's go to Defense Exhibit  
6 196.

7           Q.    (By Mr. Hueston) And this is the settlement  
8 agreement with Microsoft.  Did you review that as part  
9 of your analysis in this case?

10          A.    I reviewed it, yes.

11          Q.    All right.

12                  MR. HUESTON:  And to Page 7 of this  
13 document, please.

14          Q.    (By Mr. Hueston) Here's the payment section.  
15 This is Microsoft shall pay Triton \$4,500,000 right?

16          A.    Yes.

17          Q.    All right.  A lot higher than the other ones  
18 you were shown, correct?

19          A.    Yes.

20          Q.    Okay.  Now, I've shown you three at 4 to \$5  
21 million.  Does that change your opinion in this case?

22          A.    No.  These are still settlement agreements, so  
23 I think -- whether they're high or low, I don't think  
24 they're relevant, because -- back to the cartoon we  
25 had -- the circumstances of the negotiation for the

1 settlement are just too different. They're not what  
2 we're supposed to do in the hypothetical negotiation.

3 Q. Well, what else is -- what's involved in  
4 lawsuit settlements that makes it an apples and oranges  
5 comparison, that makes it difficult for you, if not  
6 impossible, to use those to set some kind of rate?

7 A. Well, one of the things that we don't have in  
8 the settlement is back to this concept that we don't  
9 know how much revenue is at issue.

10 So you may have one that sits there looking  
11 like a low amount because it's 150,000-dollar  
12 settlement, but if the parties -- you know, the company  
13 that is getting the license only had, let's say, a  
14 million dollars a year of revenue, that's actually,  
15 effectively, a much higher royalty than I'm suggesting  
16 here at a quarter to a half percent.

17 If you have a million dollars a year revenue,  
18 your royalty payment at the quarter to half percent  
19 would be \$2500 a year to \$5,000 a year. So at \$150,000,  
20 you've bought decades of coverage on that patent.

21 So you really can't tell unless you know how  
22 much revenue there is.

23 Q. Because that could be a lot of money for that  
24 company, given the involved revenue, right?

25 A. Yes.

1 Q. Let's -- let me see if I can get a couple of  
2 examples out of the exhibits and things you've looked  
3 at.

4 MR. HUESTON: Let's look at Defense  
5 Exhibit 135.

6 Q. (By Mr. Hueston) And this is a Bright response  
7 lawsuit settlement agreement with a company called Art  
8 Technology Group.

9 Did you review that, sir?

10 A. Yes.

11 MR. HUESTON: If we can you pull that up,  
12 please.

13 Q. (By Mr. Hueston) And let me start -- is that  
14 it right there?

15 A. Yes.

16 Q. Bright Response/Art Technology Group. We'll  
17 go back to the first page in a moment.

18 MR. HUESTON: Let's pop right over to  
19 Page 4.

20 Q. (By Mr. Hueston) Now, in the money paid  
21 section here, Defendant agrees to pay Plaintiff a total  
22 of \$38,000, just \$38,000 for this.

23 And do you remember how many patents were  
24 involved in this agreement?

25 A. I think there were two or three. We'd need to

1 look at Exhibit C.

2 Q. All right. Let's just assume two. Does that  
3 mean -- would you conclude, sir, that, gosh, the most  
4 that those patents could be worth, then, is 15,000  
5 \$16,000? Is that a fair statement, based on throwing  
6 that lump-sum amount out at you?

7 A. No, I don't think that's fair at all. We  
8 don't know how much revenue there was. This may  
9 actually be a higher effective royalty than I'm  
10 suggesting for Google and Yahoo!.

11 Q. Well, actually, in this agreement --

12 MR. HUESTON: Let's go back to Page 1.

13 Q. (By Mr. Hueston) -- there is a clue in this  
14 settlement agreement, sir.

15 MR. HUESTON: Let's go to Page 1.

16 Q. (By Mr. Hueston) -- in terms of what revenue  
17 may have been involved here.

18 MR. HUESTON: Let's go under the second  
19 paragraph.

20 Q. (By Mr. Hueston) This says: Whereas Defendant  
21 has represented that approximately \$380,000 in revenue  
22 has been generated in the United States from the sale of  
23 products accused of infringing the Plaintiff patents by  
24 Plaintiff in the litigation.

25 Does that statement have significance to you

1 in trying to get a bead on and understand that  
2 38,000-dollar amount?

3 A. Yes. It's extremely significant.

4 Q. How so?

5 A. This is -- this -- this agreement actually has  
6 the kind of information that all those other ones that  
7 I've been asked about don't have; namely, some clue as  
8 to the amount of revenue that was implicated by the  
9 patent lawsuit.

10 And here we have a representation by the  
11 Defendant that they have \$380,000 in revenue that would  
12 have been infringing the patent if it -- you know, if  
13 you assume it was valid, and they're paying \$38,000 for  
14 that.

15 Q. \$38,000 is what percentage of \$380,000?

16 A. 10 percent.

17 Q. 10 percent.

18 And now, this agreement talked about using it  
19 in a forward setting as well. But have you looked at  
20 this, and can I ask you to do some sort of rough, you  
21 know, running royalty equivalent here?

22 A. Well, I mean, if one wanted to turn this into  
23 a running royalty equivalent, you would say, well, they  
24 got a license. They basically got this \$380,000  
25 excused, plus the future.



1 THE COURT: What?

2 MR. VERHOEVEN: Objection, scope, report.

3 THE COURT: Well, overruled.

4 A. So --

5 THE WITNESS: Can you pop back out, so I  
6 can see the date of this? I think it's in '07 or in  
7 '08.

8 Q. (By Mr. Hueston) I'll represent it's June  
9 30th, 2008.

10 A. Okay. 2008. Just doing a sort of back of the  
11 envelope on this, I think I come up with -- if you  
12 assume that that \$380,000 had been over -- and the  
13 patent issued in 2002, but -- and we don't know how many  
14 years it was, but let's say that they're at \$100,000 a  
15 year, and they've got ten more years, from 2008 to 2018,  
16 that they're buying the license to this. So they've got  
17 380,000 plus probably another million dollars of  
18 revenue.

19 And so that's \$1.388 million, and they're  
20 paying \$38,000 for the license to that. That's about  
21 2.8 percent effective royalty, if you want to take this  
22 as a data point.

23 Q. Right. If you want to go into the arena of  
24 lump-sum lawsuit settlements, you could have made that  
25 kind of calculation and -- and -- and used that to set a

1 rate. But did you do so in this case, sir?

2 A. No. I think settlements are -- the parties  
3 are agreeing to end their dispute in a way that is not  
4 relevant to the hypothetical negotiation.

5 Q. 2.8 percent is a whole lot higher than the  
6 quarter penny to a half percent you've recommended in  
7 this case, sir?

8 A. Yes.

9 MR. VERHOEVEN: Objection, leading.

10 THE COURT: Sustained. Avoid leading on  
11 redirect.

12 MR. HUESTON: Thank you, Your Honor.

13 Q. (By Mr. Hueston) Would it have -- in your  
14 view, sir, would it have been fair to try to use that  
15 percentage to set the rate against the Defendants in  
16 this case?

17 A. Well, I think I've been consistent in saying  
18 that I think the settlement agreements are -- there's  
19 too many other things going on.

20 I think if one is going to wade into the arena  
21 of settlement agreements and use them, you have to take  
22 these data points along with the other ones and consider  
23 that, if nothing else, this type of agreement where we  
24 do have some clues illustrates how misleading it can be  
25 to look at the lump sums and the other settlements

1 without those clues.

2           You're just sort of taking a lump sum and  
3 saying: I think this is applicable to Google and Yahoo!  
4 when the size of the companies are so different.

5           Q.    Okay. I want to give you one last  
6 illustration.

7                   MR. HUESTON: Let's go to Defendants'  
8 Exhibit 146, which is an agreement with Amazon.com.

9           Q.    (By Mr. Hueston) Did you consider that as part  
10 of your effort in this case?

11          A.    Yes.

12          Q.    All right. Now, this one, down on --

13                   MR. HUESTON: Let's go right to Page 5.

14          Q.    (By Mr. Hueston) The money here agreed to by  
15 Amazon.com was \$400,000; is that right?

16          A.    Yes.

17          Q.    Again, does that mean, to your thinking, that  
18 \$400,000 --

19                   MR. VERHOEVEN: Sorry, Your Honor.

20                   Objection. This agreement in its  
21 entirety is not in the report.

22                   THE COURT: Well, approach.

23                   (Bench conference.)

24                   THE COURT: Is it in evidence?

25                   MR. VERHOEVEN: Is it in evidence?

1 MS. CANDIDO: Here's a list of the --

2 MR. VERHOEVEN: Is it in evidence, is the  
3 Judge's question.

4 MR. HUESTON: Mine is listed as Defense  
5 Exhibit -- I'm using this for illustration purposes  
6 only.

7 THE COURT: Right. Are you going to  
8 limit it to the face of the agreement?

9 MR. HUESTON: Yes.

10 THE COURT: Okay. That's overruled.

11 (Bench conference concluded.)

12 Q. (By Mr. Hueston) Okay. Continuing,  
13 Dr. Becker, so here at Page 5, it says: Consideration,  
14 \$400,000; is that right?

15 A. Yes.

16 Q. And then going to the front of the agreement  
17 under the same front section, there's a paragraph there.  
18 Defendant represents that, from inception to effective  
19 date, gross revenues from the Clickriver advertising  
20 program operated by the Defendant company is less than  
21 \$4 million, such representation having been relied upon  
22 by Plaintiff in entering this agreement.

23 Does that data point put the 400,000 in  
24 perspective?

25 A. Yes. Just -- just like the other one where,

1 you know, on the surface, a 38,000-dollar agreement  
2 looks like it's vastly cheaper than a 400,000-dollar  
3 agreement, but we can see that effectively Art  
4 Technologies at \$38,000 and Amazon at \$400,000 are  
5 paying about the same rate.

6 I mean, both of these amounts are 10 percent  
7 of the revenue that they represent was implicated by the  
8 patents.

9 Q. Great. Okay. Let's move on to a different  
10 topic.

11 Now, one of the things that counsel for Google  
12 asked you, he asked you a series of questions whether  
13 you owning a house would pay \$64 million.

14 You answered that -- you had been talking  
15 about the running royalty, not 64 million. The running  
16 royalty of .25 to .5 percent.

17 Do you remember that line of questioning?

18 A. Yes.

19 Q. And then -- he then asked you, going back to  
20 your analysis: Well, sir, what was the net present  
21 value?

22 Remember that?

23 A. Yes.

24 Q. All right. I'm going to ask you a couple of  
25 questions about that.

1           When parties agree to a running royalty, do  
2 they know -- do they know, sitting there, what that  
3 running royalty will bring in?

4           A.     No.

5           Q.     Can you explain that to the jury.

6           A.     Well, it's -- I mean, that's the whole point,  
7 that you're sort of hitching your wagon up with them and  
8 saying: Look, instead of us writing a check now, small  
9 check, big check, any kind of check, we're going to  
10 agree that -- like on the oil and gas lease, we're going  
11 to wait and see if you find anything and wait and see if  
12 any gas comes out, and you'll pay a percentage of the --  
13 of the revenue that's generated by that process.

14          Q.     So in your hypothetical negotiation, Google  
15 and Orion, is there some sort of guarantee by Google at  
16 the end of that negotiation for 60 million bucks?

17          A.     No. No. In fact, when they walk out of the  
18 room, they haven't written a check for anything.

19          Q.     Their obligation is zero when they're stepping  
20 from the table.

21          A.     They -- they -- they have not yet incurred any  
22 payment yet. That's going to come due as they generate  
23 revenue under the agreement.

24

25

**REDACTED BY ORDER OF THE COURT**

1 [REDACTED]  
2 [REDACTED] [REDACTED]  
3 [REDACTED] **REDACTED BY ORDER OF THE COURT**  
4 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
5 [REDACTED] [REDACTED]  
6 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
7 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
8 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
9 [REDACTED]

10 I've read in the press that later when  
11 Stanford sold that stock, they sold it for, I think, 330  
12 plus million dollars.

13 Q. But, again, in a running royalty calculation,  
14 there was no deal for 300-and-something-million dollars  
15 at that table, was there?

16 A. No. No. They agreed to hitch their wagon to  
17 Google and see how it turned out.

18 Q. All right. Let's go to a different topic.

19 You had testified -- you've been asked  
20 about -- questions about the Firepond sale shortly  
21 before the first date of infringement in this case,  
22 right?

23 A. Yes.

24 Q. All right. And now, in this case --

25 MR. HUESTON: If we could put Slide 49

1 up, please.

2 Q. (By Mr. Hueston) In this case, the negotiation  
3 you must consider involves parties which know and agree  
4 that the patent has been infringed; is that right?

5 A. Yes.

6 Q. Okay. And this is the scenario that's --  
7 you're supposed to be in in considering damages --

8 A. Yes.

9 Q. -- in the hypothetical negotiation?

10 A. Yes.

11 Q. All right. So here what the jury -- is it  
12 true that the jury is supposed to be assuming that  
13 Yahoo! is saying yes here?

14 A. Yes.

15 Q. And that Google is saying yes?

16 A. Yes.

17 Q. Now, you were asked to compare this to the  
18 Firepond sale with Doug Croxall, which you talked about  
19 was, you know, a situation of a company in distress.

20 Let me ask you, from your review of  
21 information and depositions in this case, was Firepond  
22 even aware that Yahoo! was infringing the '947, the Rice  
23 patent?

24 A. I'm not aware of any evidence that they could  
25 have known.



1 Q. And similarly, any evidence that you've seen  
2 that Doug Croxall or Firepond was even aware that Google  
3 was infringing --

4 A. No.

5 Q. -- the Rice patent?

6 A. No.

7 Q. So Firepond didn't have a Google  
8 representative coming up to them saying: We infringe.  
9 Let's talk about licenses.

10 A. No.

11 Q. No evidence of that, right?

12 A. That's right.

13 Q. Same with Yahoo!?

14 A. That's right.

15 Q. From your review of the evidence, did the  
16 owner of Firepond, unlike Bright Response in this case,  
17 take any steps to figure out if Google infringed?

18 A. Not that I'm aware of.

19 Q. Same with Yahoo!; any steps that Yahoo!  
20 infringed?

21 A. None that I'm aware of.

22 Q. Any evidence that they gathered source code --

23 A. No.

24 Q. -- at the Firepond stage?

25 A. No.

1           Q.    In your opinion, does a patent owner get less  
2 money in negotiation if the owner does not even know if  
3 other companies are using the invention?

4           A.    Yes.

5           Q.    Can you -- do you have -- you know, an example  
6 that you can share with the jury to illustrate that  
7 concretely?

8           A.    Well, you know, I hate to beat the oil and gas  
9 analogy to death, but in these parts, I think it -- it's  
10 what I'm aware of.

11                   You know, this notion of are you aware of the  
12 patent being valid and infringed, I think, is analogous  
13 to what happened with they Haynesville Shale in East  
14 Texas and Western Louisiana.

15                   Prior to 2008, before Chesapeake and other  
16 companies came in and proved up that, boy, there's this  
17 shale play under parts of Panola County and Harrison  
18 County and Bossier, Louisiana, lease bonuses for acreage  
19 around these parts were under \$500 an acre.

20                   And when the awareness of that play being  
21 valid were brought to the market, the lease bonus prices  
22 for acreage where you had shale went to over \$20,000 an  
23 acre. In fact, I'm aware of one transaction at \$30,000  
24 an acre.

25                   And that happened in the space of a very short

1 amount of time simply because of that awareness of the  
2 validity of the shale play.

3           And so it is entirely consistent that you  
4 could have a valuation being done without this knowledge  
5 of validity and infringement that's vastly different  
6 than a valuation that is perfectly reasonable with the  
7 assumption of validity and infringement.

8           Q.    Okay.  Thank you.  Let me move to another  
9 topic.

10           You were brought through a line of  
11 questioning, did you consider this agreement and that  
12 agreement and that agreement, a whole list of stuff.  
13 I want to ask you:  What were -- you've gone through  
14 this scenario where it has to be assumed that the  
15 company's saying:  Yes, we agree that we are infringing.  
16 We're using -- we're using the invention.

17           Which agreements, Dr. Becker, in the evidence  
18 was it clear to you that the -- that Google and Yahoo!  
19 were using the invention?

20           A.    On the Google side, the only one that I'm  
21 aware of that there's clear statements that they have  
22 used the technology is the patents related to the  
23 Stanford agreement.

24           And on the Yahoo! side, the questions I was  
25 asked about that make it clear that -- that the '361,

1 the Overture patent portfolio, is something that is used  
2 in the -- in the -- I think they described it as in the  
3 corps of Sponsored Search.

4           So those two situations we know -- I think  
5 they would say: Yes, we agree. We're using it. I'm  
6 not aware that in any of the other ones that we've  
7 talked about there's clear evidence that they're  
8 actually using the technology.

9           Q.     And why is that an important point for you?

10          A.     Well, it -- it has a bearing on -- on what the  
11 license is worth.

12                 If you're -- if the parties are getting a  
13 license to say: Well, you know, we might use it, or if  
14 it's being used a little bit, then that impacts the  
15 royalty base, and we have the same situation that, you  
16 know, what looked like a low amount, the 38,000-dollar  
17 settlement, when you actually brought in -- well, it's  
18 only 380,000 in revenue. It's not being used a lot or  
19 they're not a very big company, it has a huge bearing on  
20 what that rate really is.

21          Q.     All right. You were asked a number of  
22 questions by Yahoo! counsel about the Overture license,  
23 right?

24          A.     Yes.

25          Q.     And words to the effect of important to the

1 business or fundamental.

2 Do you remember that?

3 A. Yes.

4 Q. Okay. And royalties for the Overture licenses  
5 that you discussed range in the 3 point, I believe, 75  
6 range up to 5.

7 THE COURT: Counsel, approach.

8 (Bench conference.)

9 THE COURT: I was trying to interrupt you  
10 before you said that, because I thought that that was  
11 part of the area that you wanted me to close the  
12 courtroom, so...

13 MR. HUESTON: Oh.

14 THE COURT: Well, he's asked it now, but  
15 can you just move to something that doesn't ask -- I  
16 mean, I can't unring the bell, but I was trying to do  
17 that for you before he asked the question. Just  
18 avoid those --

19 MR. HUESTON: One -- one thought. I was  
20 going to just keep the question to the percentages,  
21 which is what he asked on direct, so I don't think -- I  
22 mean, I think --

23 THE COURT: Well, it's during direct,  
24 though.

25 MR. HUESTON: I mean -- I'm sorry --

1 during cross.

2 THE COURT: During cross -- well, I  
3 thought that -- stay away from the percentages, if you  
4 don't mind. Just say that the range has been outlined.

5 MR. HUESTON: Okay. Good. Then I can  
6 proceed on that.

7 THE COURT: Proceed with that, okay?

8 MR. HUESTON: Okay. Good. Good.

9 THE COURT: Thank you.

10 (Bench conference concluded.)

11 Q. (By Mr. Hueston) Dr. Becker, with that range  
12 of the percentages in mind for those -- for those  
13 licenses, have you suggested to the jury that the Rice  
14 patent should get that same range of royalty?

15 A. No, absolutely not.

16 Q. All right. Why not?

17 A. Because it's -- it's one patent. It's one  
18 element of the system. It's -- you know, and I think  
19 my -- the rate that I have suggested as the reasonable  
20 rate would put that as a small component of the system.

21 Q. In fact, what you've recommended is between  
22 1/10 and 1/20 as much, correct?

23 A. Yes.

24 Q. Let's go on to another topic.

25 MR. HUESTON: Let's put up Slide 73,

1 please.

2 Q. (By Mr. Hueston) You were asked a number of  
3 questions concerning -- about -- concerning what you  
4 considered and what you didn't consider --

5 A. Yes.

6 Q. -- right, Dr. Becker?

7 A. Yes.

8 Q. So just for your ease and convenience, I put  
9 the 15 Georgia-Pacific Factors back up.

10 Can you remind the jury, what are you supposed  
11 to be considering in terms of the body of your analysis?

12 A. Well, as a first step, I'm supposed to  
13 consider all of these factors and determine which ones  
14 are applicable in a particular case. Which ones do we  
15 have evidence for? Which ones are the circumstances,  
16 like the razors and razor blades, say that Factor 6 are  
17 out?

18 So you're supposed to consider them all and  
19 weigh them together to arrive, in Factor 15, at a  
20 negotiation for a reasonable rate considering those  
21 different factors.

22 Q. Okay. And I think Mr. Rooklidge asked you,  
23 did you consider economic demand curves? Do you  
24 remember that question?

25 A. Yes.

1 Q. Is that specifically on the list?

2 A. No.

3 Q. You were asked if you considered, I think,  
4 quote/unquote, complicated formulas, end quote.

5 Do you remember that question?

6 A. Yes.

7 Q. Is that specifically on the list?

8 A. No.

9 Q. Okay. What about mathematical quantifications  
10 of the improvement? Is that specifically on the list?

11 A. No.

12 Q. All right. Now, I do want to ask you this:  
13 Is -- there are a number of questions about trying to  
14 quantify the amount of an improvement.

15 Is that quantification, from your experience,  
16 and with reference to this analysis, required under the  
17 Georgia-Pacific analysis?

18 A. No. I think you look at the evidence that you  
19 have, and there are cases where you have very precise  
20 testing and laboratory data that can tell you how much a  
21 chemical patent, for example, may contribute to a  
22 process.

23 But in patents that are sort of more  
24 business-oriented, it's rare that you have a precise  
25 scientific or sort of laboratory quantification of the



1 impact of a patent.

2 Q. Any such information provided to you to allow  
3 you to make that kind of analysis?

4 A. No, not that -- where anybody said: Let's  
5 flip the '947 patent on and off and look at what it does  
6 to Google or Yahoo!'s system.

7 Q. And in your experience, who provides that  
8 information?

9 A. Well, in a situation like this, the -- the  
10 only party that would be able to do a test like that  
11 would be a Yahoo! or a Google since that's where the  
12 system is.

13 You can't sort of take a copy of it and run  
14 it. You would need to replicate millions and millions  
15 of queries coming in. And the systems are just too big  
16 for anyone else to test them other than the companies.

17 Q. And in this case, did you consult with an  
18 expert to try to get a sense of the type of improvement  
19 in this case?

20 A. Yes.

21 Q. And who was that?

22 A. That was Dr. Rhyne.

23 Q. And with that information and other points,  
24 were you able to make what you thought was a fair  
25 comparative analysis?

1           A.     Yes.

2           Q.     Let me ask you about lump sum versus running  
3 royalty for just a few moments.

4                   Between lump sum and running royalty, your  
5 opinion is running royalty, correct?

6           A.     Yes.

7           Q.     Was that consistent with what the Google  
8 expert in another case expressed?

9           A.     Yes. Mr. Mike Wagner, who's an expert that I  
10 know and respect, was an expert for Google and  
11 offered -- or his testimony was that a running royalty  
12 was an appropriate --

13                   THE COURT: Just a second.

14                   MR. VERHOEVEN: Objection, move to  
15 strike.

16                   THE COURT: I'll sustain that. Let's  
17 limit the questions to the Google-Stanford license.

18           Q.     (By Mr. Hueston) And Mr. Wagner, did he opine  
19 as to --

20                   MR. VERHOEVEN: Objection.

21                   MR. HUESTON: Side-bar, Your Honor?

22                   THE COURT: Yes.

23                   (Bench conference.)

24                   MR. HUESTON: Your Honor, I think it's  
25 fair to mention a name. I'm not going to get into

1 anything more than that without a name. It just sounds  
2 like it's just --

3 THE COURT: A name of what?

4 MR. HUESTON: A name of the man, not the  
5 case, the result or anything like that. I didn't hear  
6 anything keeping that out of bounds.

7 THE COURT: No. That's permissible, but  
8 I just didn't understand what question you were going to  
9 ask.

10 MR. HUESTON: Oh, I'm just going to ask,  
11 did Mr. Wagner -- what did he say with respect to the  
12 Stanford.

13 THE COURT: So I overrule the objection.  
14 (Bench conference concluded.)

15 Q. (By Mr. Hueston) And, Dr. Becker, what did  
16 Mr. Wagner say was the appropriateness of a conversion  
17 analysis for that Stanford-Google agreement?

18 A. He felt that treating the equity grant that  
19 Stanford received as being equivalent to a running  
20 royalty was appropriate.

21 Q. And is that one of the factors you've taken  
22 into consideration in determining if a running royalty  
23 is appropriate in this case?

24 A. Yes.

25 Q. Now, you were asked by counsel -- I think by

1 Yahoo! and perhaps by Google -- I don't quite recall --  
2 if you just click on the ad, it's outside of what's  
3 being accused here, right?

4 A. Yes.

5 Q. And you admit that's something that you've  
6 accounted for in your analysis, right?

7 A. Yes.

8 Q. How come that doesn't affect your analysis,  
9 the fact that the click is outside the infringement?  
10 That's where they get the money, so how can that not be  
11 separated from the money that you're asking the jury to  
12 return in this case?

13 A. Well, it -- you know, the issue is that the --  
14 I have to assume that the patent is used -- that the  
15 product AdWords or Sponsored Search is infringing.  
16 You know, the fact that sort of when you go ringing a  
17 cash register isn't described by the claims in the  
18 patent, I don't think that's really relevant.

19 I mean, the question is whether the product  
20 that is being presented to people to generate revenue  
21 with is infringing. And we have -- I have to assume  
22 that it is.

23 Q. All right. Let's go to -- the next line of  
24 questioning I have for you, sir, I want to -- you had a  
25 number of questions where you were asked about how you

1 size the quarter to the half penny royalty, so I want to  
2 address that for a moment.

3 MR. HUESTON: Let's put up Slide 37,  
4 please.

5 Q. (By Mr. Hueston) You had spent -- you had been  
6 asked about the sizing of the royalty. Let me ask you  
7 this: If you converted these changes to pennies on the  
8 dollar, how do these changes, incremental  
9 improvements -- as you were telling Mr. Rooklidge, it's  
10 incremental on improvement here with the Rice patent,  
11 how does this translate?

12 A. Well, that first one is 4 cents on the dollar.  
13 The second one is 2 cents on the dollar. And that tweak  
14 to the blue bar spacing is a penny on the dollar, which  
15 are all substantially larger -- multiples of what I have  
16 at the quarter penny to a half penny.

17 Q. So just -- the first one -- so just changing  
18 the size of the letter, that's a 4-penny-on-the-dollar  
19 change?

20 A. Yes.

21 Q. But your recommendation for running royalty is  
22 a quarter to half penny, right?

23 A. Yes.

24 Q. Changing the font face is 2 pennies on the  
25 dollar --

1 A. Yes.

2 Q. -- right?

3 You're a quarter to a half penny, right?

4 A. Yes.

5 Q. Moving the little blue bar, that's a 1  
6 percent, right?

7 A. Yes.

8 Q. One penny on the dollar?

9 A. Yes.

10 Q. And you're a quarter penny to a half penny,  
11 right?

12 A. Yes.

13 MR. HUESTON: No more question.

14 THE COURT: Hold on just a second.

15 Well, that's a good thing there's no more  
16 questions, because we're taking our morning recess.

17 Take 20 minutes. Be back at 10:30.

18 Remember my prior instructions. Don't  
19 talk about the case.

20 LAW CLERK: All rise.

21 (Jury out.)

22 THE COURT: Be seated.

23 Counsel -- hold on a second -- I directed  
24 you to avoid leading on redirect. I expect you to  
25 follow my instruction. Now, he's not going to have to

1 stand up and object to you violating my instructions.

2 Any question?

3 MR. HUESTON: I apologize, Your Honor.

4 THE COURT: My question to you is: Do  
5 you have any questions of me about that instruction?

6 MR. HUESTON: No, Your Honor.

7 THE COURT: Okay. Secondly, I gave  
8 Mr. Verhoeven a Miranda warning a couple of days ago  
9 about violating my order in limine.

10 Now, I thought that I had limited  
11 testimony about Mr. Wagner's opinion to his conversion  
12 of the Google-Stanford license, not that he opined  
13 further that Google had entered into an agreement or  
14 would have entered into a running royalty in that case.

15 Now, I'm -- you know, I'm -- that's the  
16 question that I thought that you had asked the witness  
17 on the stand.

18 Did I misunderstand something?

19 MR. HUESTON: Your Honor, what I was  
20 trying to frame is the -- the -- just the  
21 Google-Stanford, what did he do? It's a conversion with  
22 a running royalty. I may have gotten gummed up. It was  
23 not a broader question.

24 THE COURT: Well --

25 MR. HUESTON: It was just that.

1 THE COURT: -- you have now got my  
2 Miranda warning, okay? I'm not going to give any  
3 further instructions other than sustaining his objection  
4 and instructing to strike.

5 MR. HUESTON: All right.

6 THE COURT: And I'm not suggesting that  
7 you did it intentionally.

8 MR. HUESTON: I did not, Your Honor.

9 THE COURT: But the same instruction and  
10 caution to you. You need to exercise caution when you  
11 get that close to a ruling.

12 MR. HUESTON: Yes, Your Honor.

13 THE COURT: Follow my instructions on  
14 leading the witness on redirect, okay?

15 MR. HUESTON: I will.

16 THE COURT: All right. Whose cell phone  
17 went off?

18 MR. GOLDBERG: Mine.

19 THE COURT: Off the record.

20 (Discussion off the record.)

21 THE COURT: All right. We're in recess  
22 until 10:30.

23 LAW CLERK: All rise.

24 (Recess.)

25 LAW CLERK: All rise.



1 (Jury in.)

2 THE COURT: Please be seated.

3 Mr. Verhoeven?

4 MR. VERHOEVEN: Yes, Your Honor.

5 THE COURT: Additional cross-examination?

6 MR. VERHOEVEN: Just a few.

7 RECROSS-EXAMINATION

8 BY MR. VERHOEVEN:

9 Q. Dr. Becker, you testified on redirect about  
10 the Stanford agreement. Remember that?

11 A. Yes.

12 Q. The Stanford agreement does not concern the  
13 '947 patent, does it, sir?

14 A. It does not.

15 Q. And you testified in connection with Yahoo!  
16 about the Overture agreement generally.

17 A. Yes.

18 Q. You remember that?

19 A. Yes.

20 Q. The Overture agreement does not concern the  
21 '947 patent, does it, sir?

22 A. It does not.

23 THE COURT: Mr. Verhoeven, you may need  
24 to switch --

25 MR. VERHOEVEN: Oh, thank you.

1 Put up DX Demo 71, please.

2 There we go. DX Demo 71, please.

3 That's wrong. I apologize, Your Honor.

4 There we go.

5 Q. (By Mr. Verhoeven) Dr. Becker, you testified  
6 on redirect about a couple of agreements that did  
7 concern the '947 patent that I hadn't mentioned in my  
8 cross that had language in the actual agreements that  
9 represented how much revenue the licensee was saying  
10 that was obtained.

11 Do you remember that generally?

12 A. Yes.

13 Q. Now, the agreements we went over, which I have  
14 up here summarized on DX Demo 71, none of those  
15 agreements have such representations in them, do they,  
16 sir?

17 A. That's correct.

18 Q. There's no representation in the Banter's  
19 license agreement that there's a limit on how much  
20 revenue there was, right?

21 A. No. And I think in your question --

22 Q. Is that right? Is that right?

23 A. As a limit, there's no mention of the revenue.  
24 Those other ones weren't the limit. They were the  
25 representation of the amounts that was referenced.

1 Q. Fair point.

2 There's no mention in the Banter agreement, no  
3 representation about the amount of revenue in the Banter  
4 agreements, correct?

5 A. Correct.

6 Q. Same is true for Keystone?

7 A. Correct.

8 Q. And Kana?

9 A. Correct.

10 Q. Black & Decker?

11 A. Correct.

12 Q. Whirlpool, Macy's, and Apple?

13 A. Correct.

14 Q. Okay. Now, you did mention some other  
15 agreements that we hadn't gone into: The SAP agreement,  
16 the Oracle agreement, and the Microsoft agreement.

17 Remember that?

18 A. Yes.

19 Q. And those are all agreements that concern the  
20 '947 patent, right?

21 A. Yes.

22 Q. Would you agree with me that in all three of  
23 those agreements, what was licensed was an entire  
24 portfolio of patents?

25 A. Yes. There were multiple patents. We would

1 have to look at the agreements to see whether it was the  
2 fourteen or the two. There were multiple patents.

3 Q. There were fourteen patents and five  
4 applications in each of those agreements, sir?

5 A. I'll take your representation.

6 Q. And that averages out to about \$250,000 per  
7 patent and application, if you do the math, right?

8 A. If you just do the math.

9 Q. Okay. Now, the highest agreement that you  
10 found -- the highest license agreement that you found  
11 that involves the '947 patent is for a lump sum of 5  
12 million, right?

13 A. Yes.

14 Q. Okay.

15 A. In terms -- in terms of the lump-sum  
16 settlement amount, yes.

17 Q. There's a bunch of license agreements that  
18 involve the very patent at issue in this case, right?

19 A. Yes.

20 Q. Okay. And the highest lump-sum payment that  
21 you saw in any of those agreements was \$5 million,  
22 right?

23 A. Yes.

24 Q. And that's for fourteen patents and five  
25 applications, right?

1 A. Yes.

2 Q. Okay. Now, \$65 million is 1,300 percent  
3 higher than \$5 million, isn't it, sir?

4 A. I'll take your representation on the math.

5 Q. You don't disagree with that math?

6 A. I don't disagree with that.

7 MR. VERHOEVEN: Thank you, Your Honor.

8 No further questions.

9 THE COURT: Thank you, Counselor.

10 Mr. Rooklidge?

11 MR. ROOKLIDGE: Nothing further, Your  
12 Honor.

13 THE COURT: Any redirect?

14 MR. HUESTON: Very briefly, Your Honor.

15 THE COURT: All right.

16 REDIRECT EXAMINATION

17 BY MR. HUESTON:

18 Q. Dr. Becker, counsel for Google put that list  
19 up.

20 MR. HUESTON: If I could ask the help of  
21 the Defense, if you could put the list back up, your  
22 Slide 71, please.

23 Thank you very much.

24 Q. (By Mr. Hueston) With reference to this, I  
25 want to ask you, was there any representations that

1 you're aware of in these agreements about how much the  
2 accused revenue was?

3 A. No. No. That's my point as to why they're  
4 difficult to use.

5 Q. And can you explain that? Is it harder or  
6 easier to make a comparison, if accused revenue is  
7 mentioned or not mentioned in a lump-sum settlement?

8 A. Well, I think if it's not mentioned, it's  
9 almost impossible to understand the effective amount  
10 that's being paid. And we saw that with the  
11 38,000-dollar amount that on its face seems very small.  
12 But when you understand the amount of revenue that's at  
13 stake, it's actually a pretty substantial percentage  
14 royalty.

15 Q. In your analysis, Dr. Becker, have you been  
16 asked to assume how much each company is using the  
17 patented invention?

18 A. Yes.

19 Q. On a daily basis, how much is Google using the  
20 patented invention?

21 MR. VERHOEVEN: Objection. Beyond the  
22 scope.

23 THE COURT: Overruled.

24 A. Billions of searches.

25 Q. (By Mr. Hueston) And Yahoo!?

1 | A. Billions of searches.

2 Q. Looking at this, do you have any information  
3 about how much these companies are using the patented  
4 invention?

5 A. No, no information at all. That's the point.  
6 We just don't know.

7 MR. HUESTON: No more questions.

8 | THE COURT: Recross?

9 MR. VERHOEVEN: Nothing further, Your  
10 Honor.

11 MR. ROOKLIDGE: Nothing further.

12 THE COURT: All right. You may step  
13 down.

14 THE WITNESS: Thank you.

15 THE COURT: Who will be your next  
16 witness?

17 MR. SPANGLER: Your Honor, at this time,  
18 the Plaintiffs will be calling Doug Croxall, who was the  
19 Firepond owner at the time of the sale to Orion, and  
20 Luke Yeh, who was a former witness for Yahoo!.

21 THE COURT: By --

22 MR. SPANGLER: By video.

23 THE COURT: -- video deposition?

24 MR. SPANGLER: Yes, Your Honor.

25 THE COURT: Ladies and Gentlemen, recall

1 my instructions about depositions -- depositions and the  
2 procedure whereby for one reason or another the witness  
3 can't be here in Court to testify.

4           You should consider the fact that the  
5 witnesses are sworn, under oath. You should give the  
6 testimony, to the extent possible, the same weight that  
7 you would give it as if it were given here in Court, but  
8 it's procedure by which the lawyers for both parties can  
9 go and ask the witness questions under oath.

10           Turn the lights down.

11           (Video clip playing.)

12           QUESTION: Prior to your purchase of  
13 Firepond, was there any valuation of the patents  
14 performed? The Firepond patents?

15           ANSWER: No.

16           QUESTION: Was there any valuation of the  
17 '947 patent in particular performed prior to your  
18 purchase of Firepond?

19           ANSWER: No.

20           QUESTION: How, if at all, did the fact  
21 that Firepond owned this group of patents factor into  
22 your purchase of the company?

23           ANSWER: It didn't.

24           QUESTION: Did you -- at the time of your  
25 purchase of Firepond, did you have any business plan for



1 the group of patents that Firepond owned?

2 ANSWER: No.

3 QUESTION: Prior to your purchase --

4 (End of video clip for Mr. Croxall.)

5 (Video clip playing of Mr. Yeh.)

6 ANSWER: I don't think we have  
7 established that Yahoo! has any licensing policies. I  
8 would say that Yahoo! does not have any established  
9 policies regarding patent licensing.

10 QUESTION: I will ask it a different way.  
11 Does Yahoo! have any -- you say that Yahoo! doesn't have  
12 any established policies regarding patent licensing.

13 Does it have any standard practices  
14 regarding patent licenses?

15 ANSWER: What would constitute a  
16 standard -- I'm sorry. Did you say practice?

17 QUESTION: Uh-huh.

18 ANSWER: Standard practice as opposed to  
19 a non-standard practice?

20 QUESTION: Are there any particular  
21 licensing terms that Yahoo! typically pursues when  
22 negotiating patent licenses?

23 ANSWER: I would say no.

24 QUESTION: Does Yahoo! have established  
25 preferences to the form of -- of -- of royalty in the

1 license agreements it negotiates?

2 ANSWER: Aside from wanting the terms  
3 that are the best for Yahoo!, there are -- there are  
4 not.

5 QUESTION: Does Yahoo! have a preference  
6 for a lump-sum form of royalty in the in-licenses that  
7 it negotiates?

8 ANSWER: In -- could you -- when -- when  
9 you say in-license?

10 QUESTION: Where -- where Yahoo! is -- is  
11 taking a license from another party.

12 ANSWER: And receiving patent rights?

13 QUESTION: Yeah.

14 ANSWER: And I'm sorry, sir. With  
15 respect to in-licenses, the question was?

16 QUESTION: Whether Yahoo! has a  
17 preference for a lump-sum form of royalty.

18 ANSWER: I -- from my knowledge or my  
19 experience with the company, Yahoo! doesn't have any  
20 preferences with regard to in-licenses. But -- but I'll  
21 add that as far as I know or as far as I'm aware, Yahoo!  
22 has only entered --

23 QUESTION: Where Yahoo! has -- has  
24 granted licensing rights to other persons or entities,  
25 does Yahoo! have a preference for a lump-sum form of

1 royalty in those agreements?

2                   ANSWER: Again, I don't think that Yahoo!  
3 has a preference as to one form of license over the  
4 other for out-licenses.

5                   I'll also add that I'm aware of both lump  
6 sum and running royalty base out-licenses at Yahoo!

7                   QUESTION: Does Yahoo! evaluate the terms  
8 of each license agreement individually based on a number  
9 of factors?

10                  ANSWER: Yes.

11                  QUESTION: Are you aware of any instance  
12 in which Yahoo! is licensed in a single patent or a  
13 handful of patents on a running royalty basis?

14                  ANSWER: No.

15                  QUESTION: As far as you're aware, then,  
16 have all of Yahoo!'s licenses in a single patent or a  
17 handful of patents been done on a lump-sum basis?

18                  ANSWER: Yes.

19                  QUESTION: Does the lump-sum payment  
20 arrangement in those agreements reduce Yahoo!'s  
21 uncertainty as compared to a running royalty  
22 arrangement?

23                  ANSWER: Yes.

24                  QUESTION: Does the lump-sum payment  
25 arrangement reduce Yahoo!'s ongoing administrative

1 burden and inconvenience of monitoring usage of the  
2 invention or the other royalty base parameter?

3 ANSWER: Yes.

4 QUESTION: Does the lump-sum arrangement  
5 avoid Yahoo! having to disclose its confidential  
6 financial information to the licensor?

7 ANSWER: Yes.

8 QUESTION: Does the lump-sum royalty  
9 arrangement allow Yahoo! to simplify its accounting by  
10 treating the payment as a one-time expense?

11 ANSWER: Yes.

12 QUESTION: Does the lump-sum royalty  
13 arrangement allow Yahoo! to cap its liability under the  
14 licensed patent?

15 ANSWER: Yes.

16 QUESTION: So does the lump-sum royalty  
17 arrangement give Yahoo! the ability to use the patented  
18 technology for the rest of the term of the patent  
19 without further expenditure?

20 ANSWER: Yes.

21 QUESTION: Does the lump-sum royalty  
22 arrangement avoid difficulty in negotiating an  
23 appropriate royalty base?

24 ANSWER: Yes.

25 QUESTION: Does the lump-sum royalty

1 arrangement simplify and speed up negotiation of the  
2 agreement?

3 ANSWER: Yes.

4 QUESTION: In your experience, in the  
5 past, has Yahoo! entered into licenses in a lump-sum  
6 payment arrangement, because Yahoo! has benefited  
7 economically from that arrangement?

8 ANSWER: Yes.

9 QUESTION: How so?

10 ANSWER: Yahoo! has been able to get a  
11 more favorable payment.

12 QUESTION: And what do you mean by a more  
13 favorable payment?

14 ANSWER: A smaller payment.

15 QUESTION: Has Yahoo! entered into  
16 license agreements based on a lump-sum arrangement that  
17 have also mentioned a royalty rate?

18 ANSWER: Yes.

19 QUESTION: Does the mention of a royalty  
20 rate in a lump-sum license agreement suggest anything  
21 about whether Yahoo! would actually agree to pay  
22 royalties at that rate?

23 ANSWER: No.

24 QUESTION: In your experience, is it  
25 common for patent licensors to seek to have a lump-sum

1 license agreement mention a royalty rate that the  
2 licensor can later --

3 (End of video clip.)

4 (Video clip playing.)

5 QUESTION: Counsel asked you about  
6 Exhibit 14, the Harrington agreement. I put that  
7 agreement in front of you.

8 Do you see that agreement?

9 ANSWER: Yes.

10 QUESTION: Was that a document that was  
11 produced by Yahoo! in this litigation?

12 ANSWER: Yes.

13 QUESTION: Is that a document that's kept  
14 in the ordinary course of business at Yahoo!

15 ANSWER: Yes.

16 QUESTION: And was that an agreement that  
17 Yahoo! entered into?

18 ANSWER: Yes.

19 MR. ROOKLIDGE: No further questions.

20 QUESTION: You mentioned that you  
21 discussed some advantages from Yahoo!'s point of view of  
22 the lump-sum royalties with Mr. Rooklidge, correct?

23 ANSWER: Yes.

24 QUESTION: And one of those advantages  
25 you said was that under a lump sum, Yahoo! would make a

1 small payment of royalties; is that correct?

2 ANSWER: Based on what I'm -- I'm aware  
3 of, yes.

4 QUESTION: But in Yahoo!'s view, that  
5 licensor will receive less money under the lump sum than  
6 they would receive under a running royalty?

7 ANSWER: Again, based on what I've seen  
8 and based on my own opinion, that appears to be the  
9 case.

10 (End of video clip.)

11 THE COURT: Does that conclude the offer?

12 MR. SPANGLER: Yes, Your Honor.

13 THE COURT: All right. Put the lights  
14 back up.

15 Who will be your next witness?

16 MR. HUESTON: Your Honor, Bright Response  
17 calls Mr. Brad Sheafe as our next witness.

18 THE COURT: All right. Mr. Sheafe.  
19 This witness was previously sworn, correct?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: All right. Come around, sir.

22 THE WITNESS: Thank you.

23 MR. HUESTON: Thank you, Your Honor.

24 LEE BRADLEY SHEAFE, PLAINTIFF'S WITNESS, PREVIOUSLY

25 SWORN

DIRECT EXAMINATION

BY MR. HUESTON:

Q. Good morning, Mr. Sheafe.

A. Good morning.

Q. Could you state your full name for the record, please.

A. Yes, sir. Lee Bradley Sheafe. I go by Brad.

Q. Thank you.

What is your current occupation?

A. I am currently the Manager of Bright Response.

Q. Before we get into that, I would like to cover some of your personal background.

Can you tell the jury, where do you currently live?

A. I currently live in a small town outside of Champaign, Illinois.

Q. And are you married?

A. I am.

Q. Do you have any kids?

A. I do. My wife and I have four children, all girls.

Q. Sounds like you're outnumbered.

A. Even my dog is a girl.

Q. Where did you grow up?

A. Actually, I grew up all over the place. My



1 father was a Secret Service agent, and so during my time  
2 at home, we moved a lot. So I was in 10 different  
3 places before I left for college.

4 Q. All right. Let's talk about college. What's  
5 your educational background?

6 A. I graduated with a bachelor of science degree  
7 in -- from the United States Air Force Academy.

8 Q. And did you graduate with any distinctions?

9 A. I did. I graduated magna cum laude, and I was  
10 recognized as the Outstanding Cadet in my department.

11 Q. And going to the Air Force Academy, did you  
12 serve in the Air Force?

13 A. I did.

14 Q. And where were you assigned after graduation?

15 A. Immediately following graduation, I was  
16 assigned to Goodfellow Air Force Base in San Angelo,  
17 Texas, for training. I was then assigned to Luke Air  
18 Force Base, which is just outside of Phoenix, Arizona,  
19 for my initial assignment. And my final assignment in  
20 the Air Force was to the Defense Intelligence Agency,  
21 which is located in Washington, D.C.

22 Q. And can you briefly describe what you did at  
23 the Defense Intelligence Agency?

24 A. Yes, I can. I was assigned to a unit that was  
25 responsible for activities in the Middle East.

1           Q.    What did you do after serving with the Defense  
2 Intelligence Agency?

3           A.    Well, after my assignment to the Defense  
4 Intelligence Agency, I separated from the United States  
5 Air Force, and I accepted a position as a special agent  
6 with the FBI.

7           Q.    Can you briefly describe the types of work you  
8 did with the FBI?

9           A.    Sure.  Initially, all prospective agents go to  
10 Quantico, Virginia, where the FBI Academy is.  And if  
11 you successfully complete that academy training, you are  
12 then assigned to a division within the FBI.

13                   I was assigned to the Baltimore Division.  I  
14 worked initially with gangs and drugs, and then once the  
15 Bureau began to investigate cyber crimes as a separate  
16 type of crime, I was assigned as a training agent to one  
17 of the original cyber crime units within our squads  
18 within the FBI.

19           Q.    Let me stop you for a moment.  What is  
20 cyber -- cyber crimes?

21           A.    Well, there are -- there are a number of  
22 different things that fall under the umbrella of cyber  
23 crimes.  My specialty was in what is referred to as  
24 computer intrusions where -- people, generally, are more  
25 familiar with the term hacking.

1           So I would investigate both criminal hacking  
2 events as well as national security hacking events.

3           Q.    And if you could proceed with just summarizing  
4 what else you did with the FBI.

5           A.    Following 9/11, a special missions unit was  
6 established under our Counterterrorism Unit. Agents  
7 were hand-selected from different divisions around the  
8 country for assignment to that unit based on their  
9 investigative specialties as well as having a tactical  
10 background.

11           I had a tactical background coming out of the  
12 military, a special operations background. And so I was  
13 assigned to that unit for three years.

14           And subsequent to that, I was selected to be  
15 the liaison agent to the National Center for  
16 Supercomputing Applications, which is in Champaign,  
17 Illinois. And that's why my family and I live just  
18 outside of Champaign, Illinois.

19           Q.    All right. How long did you serve with the  
20 FBI, Mr. Sheafe?

21           A.    From February of 1997 to May of 2008.

22           Q.    We all remember where we were at 9/11,  
23 Mr. Sheafe. Where were you?

24           A.    I was actually out in Monterey, California, in  
25 support of the FBI's hostage rescue team, which was

1 training on Fort Ord. The hostage rescue team is the  
2 FBI's Tier I counterterrorism tactical team. Sort of  
3 think about it as like an advanced SWAT team.

4 Q. And what happened that day?

5 A. Well, we were involved in night operations,  
6 and so we had just gone to bed. All of our pagers went  
7 off. Different agents' wives and spouses began to call.  
8 And we came to realize the country had been attacked by  
9 terrorists.

10 Q. And were you mobilized?

11 A. Well, we were. We were in kind of an awkward  
12 position. The team is stationed in Quantico, Virginia,  
13 and a significant portion of it was all the way out in  
14 California. So we had to get back to -- the hostage  
15 rescue team's duty station in Quantico.

16 Q. How did that happen?

17 A. Well, we flew and we were the only aircraft in  
18 the sky over the country that night. It was surreal.  
19 We had fighter aircraft off the wings the entire way.

20 Q. And what happened, then, once you arrived?

21 A. Well, once we landed, it was the middle of the  
22 night of the following day. We unpacked our own  
23 equipment from the aircraft, and then each of the agents  
24 went to their respective duty stations and began to  
25 work.

1           Q.     Were you assigned to Ground Zero for a period  
2 of time?

3           A.     I was.   Shortly thereafter, I was asked to go  
4 up to New York, and I spent six weeks there as one of  
5 the agents working that investigation.

6           Q.     All right.  Let's turn to Bright Response.  
7                    You mentioned you were Manager of Bright  
8 Response?

9           A.     I am.

10          Q.     What is Bright Response?

11          A.     Bright Response is -- is a technology company,  
12 and what it does is it evaluates and then invests in  
13 patents.

14          Q.     All right.  And what is the primary focus of  
15 Bright Response?

16          A.     I would say the primary focus of Bright  
17 Response is in -- of all the patents that are out there  
18 that we have access to seeing, we try to find those that  
19 are undervalued, that for whatever reason the current  
20 owner of the patent doesn't really recognize what they  
21 have, and we have an opportunity to invest in that  
22 patent.

23          Q.     All right.  And is there part of the business  
24 that you focus on, Mr. Sheafe?

25          A.     There is.  I personally focus on taking the

1 opportunity to initially review the patents that are  
2 made available to Bright Response through one way or  
3 another, whether someone offers them to us or they're  
4 for sale generally.

5           And I take that initial look to see if it's  
6 something that Bright Response would be interested in,  
7 to see if the -- in terms of its technology, to see if I  
8 think that there may be some value in that patent that  
9 the current owner is not recognizing. And if that sort  
10 of passes that first sniff test for me, I then pass it  
11 off to the experts that Bright Response contracts with  
12 to further that investigation and make a decision.

13           Q.    Okay.  Let's talk a little bit about that.  
14 How many employees are there at Bright Response?

15           A.    Employees, there are two.

16           Q.    All right.  And you mentioned folks that you  
17 contract with.

18                   Can you describe a little bit about that?

19           A.    Yes, sir.  We have a large number of folks  
20 that we then contract.  So we have administrative  
21 contractors.  We have financial contractors.  And then  
22 we have sort of our expert contractors in terms of the  
23 technology.

24                   For instance, you've seen Dr. Rhyne in terms  
25 of the damages.  For instance, Dr. Becker, as well as

1 our legal experts, which are adequately represented  
2 right here in Court.

3 Q. You mentioned part of what you do is looking  
4 for undervalued patents.

5 In your experience, what are some of the  
6 reasons why a patent might be undervalued?

7 A. Well, it's a difficult thing to mine the value  
8 out of a patent. They are complex documents. They are  
9 a tough read.

10 I know you were asked to read the patent. I'm  
11 sure you've taken that seriously. They don't -- they  
12 certainly don't read like a story. So you have to work  
13 your way through that.

14 And oftentimes, patent owners don't have the  
15 time, the desire, or the resources or the expertise for,  
16 quite frankly, the world to fight to ensure that  
17 companies respect the invention that's represented by  
18 the patent.

19 Q. All right. And how long have you been with  
20 Bright Response, Mr. Sheafe?

21 A. I've been with Bright Response since March of  
22 2009.

23 Q. And have you held another position since that  
24 time?

25 A. I have. I've been in a number of other

1 positions, similar positions, to include being the  
2 President of the company that owns Bright Response,  
3 which is TechDev Holdings.

4 Q. Parent company?

5 A. It is the parent company.

6 Q. Okay. And since March of 2009, though --  
7 2009, where have you devoted your efforts? In which --  
8 in which of these positions?

9 A. Well, my efforts have been primarily devoted  
10 to my responsibilities as the President of TechDev  
11 Holdings, and a significant portion of that time has  
12 been dedicated to Bright Response.

13 Q. All right. Now, were you Manager of Bright  
14 Response when it acquired the Rice patent?

15 A. No, sir, I was not.

16 Q. Do you have an understanding of how Bright  
17 Response acquired the Rice patent?

18 A. I do have a general understanding of how it  
19 was acquired, yes, sir.

20 Q. Okay. And I'll just ask you the simple  
21 question: Is Bright Response the owner of the '947  
22 patent?

23 A. Yes, it is.

24 Q. And do you know if there was a preliminary  
25 patent application submission in connection with that?



1           A.     There was.  As we've seen testimony in Court,  
2 there was a provisional application filed on April 3rd,  
3 1997 by Chase Manhattan Bank.

4           Q.     Do you have an understanding of -- of how much  
5 the Rice patent was acquired for?

6           A.     It's my understanding -- and, again, we've  
7 seen a ton of testimony on this.

8                   MS. DOAN:  Objection, Your Honor.

9                   THE COURT:  What's the objection?

10                  MS. DOAN:  Foundation, lacks personal  
11 knowledge.

12                  THE COURT:  Overruled.

13           Q.     (By Mr. Hueston) You can answer the question.

14           A.     Thank you.

15                   It's my understanding that the patent was  
16 acquired -- and, again, we've seen this time and again,  
17 so I won't take more of your time -- it was acquired as  
18 part of a group of patents by a company called Orion  
19 from a company called Firepond.

20           Q.     And do you recall, roughly, the amount for  
21 that patent and others?

22           A.     Again, we've heard testimony that it was a  
23 million -- the cash compensation was a million dollars.

24           Q.     Okay.  Mr. Sheafe, do you believe that the  
25 patent in this lawsuit is worth, at most, about a

1 million dollars?

2 A. Absolutely not.

3 Q. Why not?

4 A. Well, at this point in time, we have mined the  
5 value out of that patent. The mine -- the Rice patent  
6 is clearly an example of one of these undervalued  
7 patents.

8 And at the time it was acquired, again, we  
9 just heard testimony, it was a distressed company. They  
10 didn't -- it was our belief they didn't know what they  
11 had. And so that patent was acquired, and then we began  
12 to put in the time and effort and resources and money to  
13 determine what the true value of that patent was.

14 Q. All right. Let's turn to a different topic.

15 Are you familiar with the process of what's  
16 called reexamination?

17 A. I am generally familiar, yes, sir.

18 Q. What's the basis of that familiarity?

19 A. Well, in my role as the Manager of Bright  
20 Response, I oversee -- when patents go through the  
21 Patent Office -- you guys have heard this term in  
22 Court -- that's called prosecution.

23 So for any patents that belong to Bright  
24 Response, any prosecution issues, any matters that are  
25 going on at the Patent Office, then I oversee them.

1           Q.     Okay.  And so what's your understanding of a  
2 reexamination?  What is that?

3           A.     Well, a reexamination, you can kind of tell  
4 from the word itself that it's a re -- we're going to do  
5 something again -- examination.

6                     So it's when someone requests that the Patent  
7 Office take another look at a patent to see if -- if  
8 it's valid.  They -- they -- they have found a document  
9 of some sort that they believe may suggest that the  
10 patent, in fact, not valid, that it shouldn't have been  
11 issued.

12                    And then they submit that to the Patent Office  
13 in a request to say would you please take another look  
14 at this patent, to test it again and see if it should,  
15 in fact, be patentable.

16           Q.     And after that sale from Firepond, are you  
17 aware of whether the Rice patent was put into that  
18 reexamination process?

19           A.     Actually, requests have gone to the Patent  
20 Office twice for the Rice patent to be reexamined.

21           Q.     Okay.  Well, let's go through them one by one.  
22                    Tell me about the first request.  Do you  
23 remember, roughly, when that happened?

24           A.     I believe that request was submitted in May of  
25 2008.

1 Q. And who put in the request?

2 A. Google did.

3 Q. And let's take a look -- well, hold on a  
4 minute -- for a second.

5 And do you have any understanding as to what  
6 was the nature of the submission? What was being  
7 requested?

8 A. Yes, sir. Again, what's being requested is --  
9 is someone thinks that some documentary evidence has  
10 been discovered that might call into question whether or  
11 not the invention should remain an invention, whether it  
12 should remain as a patent.

13 Q. All right. And do you have an understanding  
14 as to what was submitted by Google for the Patent Office  
15 to consider in terms of the reexamination?

16 A. There was a particular document that was  
17 submitted by Google in that reexamination, and I will  
18 refer to it as the Allen patent or the '664 patent.

19 Q. All right. I'm going to direct your attention  
20 to the ELMO, which I have not successfully turned on.

21 Let me try it again.

22 COURTROOM DEPUTY: You want me to do that  
23 for you?

24 MR. HUESTON: Yes, please. Thank you.

25 Thank you so much.

1 COURTROOM DEPUTY: Uh-huh.

2 Q. (By Mr. Hueston) Now, Mr. Sheafe, were you  
3 here during opening statements?

4 A. Yes, sir, I was.

5 Q. Do you remember when Ms. Doan, counsel for  
6 Yahoo!, put this up in the opening statement?

7 A. I do.

8 Q. Is this -- this says Allen patent. Is this  
9 the patent you're referring to?

10 A. Yes, it is.

11 Q. Okay. And so is this submitted for  
12 reexamination in that first effort?

13 A. Yes. This is at least one of the documents  
14 that the Patent Office was requested to consider to  
15 determine whether or not the Rice patent should remain  
16 valid.

17 Q. All right. Now, once Google put in that  
18 reexamination request, did Bright Response respond and  
19 take a step backwards?

20 A. We did. The patent owner is allowed to be  
21 involved in the reexamination of the patent that they  
22 own. So as I've said, Bright Response owns the Rice  
23 patent.

24 And so I suppose you could see this as  
25 something that, you know, might cause alarm. Your

1 patent has been sent back into the Patent Office.

2 There's a possibility the Patent Office is going to come  
3 back and say, well, wait a minute; we made a mistake; we  
4 didn't recognize that this document existed; and so  
5 we're going to invalidate your patent.

6 And then you lose it. It's one of the  
7 business risks that we take, Bright Response.

8 But in this case, we saw it as an opportunity.

9 Q. What do you mean by that?

10 A. Well, there was a number of these documents,  
11 like the Allen patent, that Bright Response had been  
12 made aware of largely through the Defendants in this  
13 case, Google and Yahoo!, who had provided us with  
14 documents that they alleged were a collection of  
15 documents that would call into question whether or not  
16 the Rice patent should remain valid.

17 So we took the opportunity to send all of  
18 those documents into the Patent Office, which we're  
19 allowed to do, and ask that the Patent Office not only  
20 consider what had been submitted in the request but also  
21 consider all of these documents.

22 And our objective there was to ensure that  
23 when the Rice patent came back out of the Office that  
24 there could be very little question as to the validity  
25 of that patent.

1           Q.     All right.  And did Google challenge, among  
2 others, the claims that are at issue in this lawsuit?

3           A.     Yes, they did.

4           Q.     And what claims are they?

5           A.     Again, you've heard this a number of times.  
6 They are Claims 30, 31, and 33.

7           Q.     What happened, to your understanding, as a  
8 result of that reexamination process by the U.S. Patent  
9 Office?

10          A.     The claims at issue in this patent, again, 30,  
11 31 and 33, were confirmed by the Patent Office.  And  
12 they have issued documents, which the Patent Office  
13 obviously does, that show what claims were confirmed.

14                 And the Claims 30, 31, and 33 were included in  
15 those documents.

16          Q.     Okay.

17                 MR. HUESTON:  Let's put up Exhibit 1043,  
18 please.  And, hopefully, I've switched to the right  
19 buttons to do that.

20                 There we go.

21          Q.     (By Mr. Hueston) So, Mr. Sheafe, I direct your  
22 attention to this exhibit.  This is the first page here.

23                 If you could explain, what is this at the top  
24 of the page?

25          A.     Well, it says United States Patent & Trademark

1 Office. So we know that's where it's from. And then  
2 there's a ton of numbers on here, not all of which are  
3 pertinent to our discussion. There's a number for the  
4 reexamination itself.

5 But we can see that the reexamination was  
6 filed in May of 2008. And then this particular document  
7 was mailed from the Office actually back to the patent  
8 counsel that represents Bright Response on July the 23rd  
9 of 2010.

10 Q. All right.

11 MR. HUESTON: Let's go a couple of pages  
12 in, please, on the exhibit.

13 All right. And let's go to the first  
14 highlighted section.

15 Q. (By Mr. Hueston) Can you read and explain what  
16 that says there?

17 A. Yes, sir. It says: Ex parte reexamination,  
18 advisory action before the filing of an appeal brief.

19 Q. So --

20 MR. HUESTON: And let's go further down  
21 in the document, under Paragraph 6, please. Let's pull  
22 that up.

23 Q. (By Mr. Hueston) And what is your  
24 understanding of what this advisory action was stating  
25 in this section?



1           A.     Well, in the highlighted section, it's stating  
2 that there are certain claims that are patentable or  
3 confirmed.

4                     And included amongst that set of claims is a  
5 block of claims, 30 to 37, which obviously includes 30,  
6 31, and 33.

7           Q.     All right. Now, just to make sure we're  
8 covering it, there's also some claims rejected, right?

9           A.     That's correct.

10          Q.     Are those at issue in this case?

11          A.     No, they are not.

12          Q.     So Google challenged 30, 31, and 33, and they  
13 were confirmed by the U.S. Patent Office?

14          A.     Google challenged actually all of the claims  
15 in this patent, and Claims -- amongst others, Claims 30,  
16 31, and 33 were confirmed.

17          Q.     You mentioned earlier there were two reexams,  
18 right?

19          A.     Well, there were two requests --

20          Q.     Requests.

21          A.     -- to the Office to reexamine the documents.

22          Q.     Thank you for that clarification.

23                     Let's -- tell the jury about the second  
24 request. What was that about?

25          A.     Well, it was much like the first request.

1           Again, a party, someone, asked that the Patent  
2 Office take yet another look at the Rice patent and  
3 provided other documentation that they believed showed  
4 that it may not be valid, that it should be tested  
5 again.

6           Q.    And who initiated that request?

7           A.    Yahoo! did.

8           Q.    The other party in this action?

9           A.    That's correct.

10          Q.    And are you aware of whether they -- what they  
11 submitted -- what claims they submitted for  
12 reexamination?

13          A.    They submitted Claims 31 and 33.

14          Q.    Two of the three claims at issue in this case?

15          A.    Yes, sir; that's correct.

16          Q.    And what was the result of that request?

17          A.    Well, in this case, it's a little bit  
18 different.

19                So in the previous case where Google had  
20 submitted the request, the Office granted the request.  
21 They said, okay, we've seen what you've submitted; we  
22 think there might be an issue here; and so we'll take  
23 another look at it; we'll run it through the tests.

24                In this case, they took a look at what Yahoo!  
25 submitted in terms of that documentation, and they said,

1 well, this doesn't even raise an issue for us, so we're  
2 going to deny the request to even take that other look.

3 Q. All right. Let's take a brief look at that.

4 MR. HUESTON: Let's take a look at  
5 Exhibit 3, please.

6 Q. (By Mr. Hueston) Is this the order -- up at  
7 the top of the page, order granting/denying request for  
8 ex parte reexamination?

9 Is this the document to which you were  
10 referring?

11 A. It is.

12 Q. Okay. And can you explain the block I'm  
13 pulling out here, and in particular, that language  
14 that's highlighted?

15 A. Certainly. The language that's highlighted  
16 talks about the request that was being made, and that  
17 request was made on the 29th of April 2010. And it  
18 talks about having been considered and a determination  
19 has been made.

20 And then if you drop down to the second part  
21 that has been highlighted, you'll see that Box No. 2 has  
22 been checked, which simply says that the request for  
23 ex parte reexamination is denied.

24 Q. All right.

25 MR. HUESTON: And let's go to the next

1 page, please.

2 Q. (By Mr. Hueston) And there is a section in  
3 this called Decision; is that right?

4 A. Yes, sir, there is.

5 Q. And what do you understand this part of it to  
6 be?

7 A. Well, I think better than even my  
8 understanding, I will just read it, if that's okay.

9 Q. Absolutely.

10 A. Thank you.

11 It says: No substantial new question of  
12 patentability is raised by the request for reexamination  
13 and prior art cited therein for the reasons set forth  
14 below:

15 And then obviously it continues.

16 Q. All right.

17 MR. HUESTON: And if we can go to the  
18 last page of this document.

19 Q. (By Mr. Hueston) Are you aware of what prior  
20 art was submitted by Yahoo! in this second effort at a  
21 reexam?

22 A. Yes, sir, I am.

23 Q. And what was that?

24 A. Well, there were a number of documents. My  
25 recollection is four; again, one of which was the Allen

1 patent.

2 Q. Okay.

3 MR. HUESTON: And if you can get to that  
4 last page.

5 Q. (By Mr. Hueston) Is there typically a notice  
6 of references cited, listing documents?

7 A. My experience has been that there's a --  
8 there's a form. It is a government organization. So  
9 there's, of course, a form, and the prior art is listed  
10 on that form.

11 Q. All right.

12 MR. HUESTON: We appear to be having  
13 technical difficulties with that, so I'm going to move  
14 on.

15 Oh, there it is. Let's blow up the first  
16 part of that, please.

17 Q. (By Mr. Hueston) This is the section you were  
18 talking about, the references submitted and cited?

19 A. Yes, sir. This is what we just brought up,  
20 the top half of the document.

21 Q. Okay. And what's your understanding of that  
22 thing on the first line there with the number and then  
23 the name?

24 A. Well, this is the section that is captioned,  
25 U.S. Patent Document, so if there are any that are

1 submitted, they would be listed here.

2 In this case, the Allen patent, the '664  
3 patent, has been listed.

4 Q. These reexaminations, they happened after that  
5 sale by Firepond?

6 A. Yes, sir.

7 Q. Mr. Sheafe, on behalf of Bright Response, in  
8 your own words, what is Bright Response seeking in this  
9 case?

10 A. We're simply seeking to get companies to  
11 respect the rights that are represented by the patent.  
12 We are seeking -- again, you've heard the term testified  
13 to again and again -- a reasonable royalty, just what is  
14 fair for the use of the invention.

15 Q. And, Mr. Sheafe, just to make clear, have you  
16 conducted your own expert analysis on those points?

17 A. No, sir, I have not.

18 Q. Who have you relied on?

19 A. I have relied upon those contractors and  
20 consultants that we hire and fully rely upon the  
21 information that they provide me. And that's how I make  
22 my decisions.

23 Q. You mentioned earlier you came to Bright  
24 Response in about March of 2000; is that right?

25 A. Yes, sir; that's correct.

1           Q.    And, roughly, how much of your time at Bright  
2 Response has been devoted to this effort, the  
3 proceedings leading to this trial?

4           A.    Of the time I have dedicated to Bright  
5 Response, almost all of it.

6           Q.    Have you been able to do -- what else, if  
7 anything, have you been able to do since March of 2009,  
8 other than things connected with this case?

9           A.    Well, I have been able to review some of these  
10 other patents. I said we have oftentimes opportunities  
11 to take a look at other patents and see if we think that  
12 they are worthy of our investment, if we think they  
13 might be those undervalued patents that we can mine the  
14 value back out of.

15                   And while we have a number of them that we  
16 continue to take a look at, we have not purchased any  
17 additional patents to this point in time.

18           Q.    Mr. Sheafe, coming from your background at the  
19 FBI and the other service that you've given, why did you  
20 decide to come work for Bright Response, to do the work  
21 that you're currently doing?

22           A.    Well, one of the things I loved about being an  
23 FBI agent, just being with the FBI in general, is that  
24 we just never back down from an investigation.

25                   No matter how complex that investigation was,

1 no matter who the bad guys were, whether it was an  
2 organized crime boss or a drug lord, or, unfortunately,  
3 sometimes even members of Congress, we pursued that  
4 investigation and had the will to see it through to the  
5 end. And I just enjoy it.

6 Q. You mentioned that this case has been taking  
7 up almost all your time since March of 2009; is that  
8 right?

9 A. That's correct.

10 Q. What do you hope to do with Bright Response  
11 after this case is concluded?

12 A. I hope to go back to doing more of what I had  
13 intended to do originally, which is take a look at the  
14 patents that we have an opportunity to review to see if  
15 they are of interest to Bright Response, give it that  
16 kind of a sniff test, and then pass it off to the great  
17 team that Bright Response has, and let them tell me what  
18 might be there that we can take advantage of.

19 Q. Thank you.

20 MR. HUESTON: Pass the witness.

21 MS. DOAN: Your Honor, may I approach?

22 THE COURT: Cross-examination.

23 MS. DOAN: May we approach, Your Honor?

24 THE COURT: Yes.

25 (Bench conference.)



1 THE COURT: Use the microphone, okay?

2 MS. DOAN: Your Honor, there are a couple  
3 of things I want to make sure we don't violate any  
4 motions in limine or anything you've said in here, Your  
5 Honor.

6 Number one is, with respect to David  
7 Pridham, David Pridham denied him at his deposition, and  
8 Mr. Sheafe took the position that he did not hire the --  
9 didn't have any consulting agreements with the  
10 inventors, but this counsel did. And we'd like to bring  
11 that out.

12 We're taking the position that they  
13 didn't, but their lawyers did. And that's not fair,  
14 Your Honor, to hide behind that.

15 And we would like to bring that out to  
16 the jury.

17 THE COURT: What's your response to that?

18 MR. HUESTON: I see no relevance.

19 THE COURT: If he does the consulting  
20 agreements that are entered into by --

21 MS. DOAN: His counsel.

22 THE COURT: -- counsel --

23 MS. DOAN: And the inventors.

24 THE COURT: -- and the inventors, you can  
25 ask him if he knows that, okay?

1 MS. DOAN: Yeah.

2 THE COURT: All right.

3 MS. DOAN: Okay. And then the second  
4 thing is, the fact that one of the documents that  
5 Mr. Hueston brought out, we'd like to be able to show  
6 the jury why they have rejected certain claims and why  
7 they have kept certain claims at issue and that's fair  
8 game.

9 THE COURT: It's in evidence, but you can  
10 ask him about the documents.

11 MS. DOAN: Sure.

12 THE COURT: Sure. Anything else?

13 MS. DOAN: I think that's it. If there's  
14 anything else close, I will be up here.

15 THE COURT: All right.

16 (Bench conference concluded.)

17 CROSS-EXAMINATION

18 BY MS. DOAN:

19 Q. Good morning, Mr. Sheafe. How are you?

20 A. I'm well, Ms. Doan. And you?

21 Q. Very well.

22 Now, Bright Response, the company for which  
23 you're the manager, has two employees, right?

24 A. That's right.

25 Q. The second employee is Mr. Erich Spangenberg?

1 A. Yes, ma'am; that's correct.

2 Q. And is he the Vice President of Licensing?

3 A. He is.

4 Q. And Bright Response is not an inventor, is it?

5 A. No, ma'am, it is not.

6 Q. And Bright Response does not make anything;  
7 it's not a manufacturer, is it?

8 A. No, ma'am. We don't make products at all.

9 Q. And Bright Response does not sell any  
10 products, does it?

11 A. No, ma'am. It simply licenses its patents.

12 Q. In fact, it's never tried to -- Bright  
13 Response has never been involved in marketing any of the  
14 embodiments of the '947 patent, has it?

15 A. The -- let me just make sure I understand  
16 embodiment. That would be a device that uses the  
17 technology the patent represents?

18 Q. Right. You don't market any of those type of  
19 products, do you, sir?

20 A. No, ma'am, we don't.

21 Q. And you told us that you live outside of  
22 Champaign. You live in Monticello, right?

23 A. Yes, ma'am.

24 Q. And, Mr. Sheafe -- Mr. Spangenberg lives  
25 where?

1           A.     He lives in Dallas.

2           Q.     Okay.  So neither one of the two employees of  
3 Bright Response live in Marshall, Texas; isn't that  
4 correct?

5           A.     Yes, ma'am; that's correct.

6           Q.     You're also the President of TechDev Holdings,  
7 and TechDev owns 99.5 percent of Bright Response; is  
8 that right?

9           A.     I believe that to be the case, yes, ma'am.

10          Q.     Are you also still the Vice President of  
11 Technology for nXn?

12          A.     No, ma'am, I am not.

13          Q.     TechDev owns several companies, does it not?

14          A.     It does.

15          Q.     And also Bright Response is not a Marshall,  
16 Texas, company, you do have an office here in Marshall,  
17 right?

18          A.     Bright Response does have an office in  
19 Marshall, yes, ma'am.

20          Q.     Do you know where it is?

21          A.     I do, yes, ma'am.

22          Q.     Where is it?

23          A.     It's right down out here, if you were to walk  
24 down Washington Street, it would be on your left.

25          There's a wine store there.  It would be just before

1 that.

2 Q. And does it share that office with several  
3 other Erich Spangenberg entities?

4 A. Yes, ma'am, it does.

5 Q. It's a two-room office; is that right?

6 A. I guess it would be fairly broken down into  
7 two rooms. They're big rooms.

8 Q. Okay. Do you know the address of this office?

9 A. I'm sorry?

10 Q. Do you know the address of this office?

11 A. Well, it's on North Washington Street. I  
12 believe the address is 2 -- either 207B or 207C. I  
13 don't ever mail anything there, so I just know where it  
14 is.

15 Q. You don't mail anything there because nobody  
16 really works there permanently, right?

17 A. Well, I don't mail anything there because I  
18 don't have anything to mail there.

19 Q. And no one works there permanently; is that  
20 correct?

21 A. That's probably fair.

22 Q. Okay. I mean, you don't have a secretary,  
23 administrator; no one's there, right? It's just for  
24 use.

25 A. Correct.

1 Q. Okay. And then the entities that you share,  
2 not only Bright Response sometimes uses it for space, as  
3 well as TechDev Holdings; is that right?

4 A. Yes, ma'am, that's correct.

5 Q. And Acclaim Financial Group also uses that for  
6 space as well?

7 A. I don't know.

8 Q. You don't know that?

9 A. No, ma'am, I don't.

10 Q. And Clear With Computers also uses it for  
11 space as well, 207C North Washington?

12 A. I believe that it does.

13 Q. It does, does it not?

14 How about EMS Technologies. It does as well,  
15 does it not?

16 A. I'm not sure.

17 Q. You're not sure?

18 EMS Technologies, that's one of your units  
19 when you were President of TechDev Holdings, is it not?

20 A. Yes, ma'am, it is.

21 Q. You've never seen any of the contracts that --  
22 and the agreements that EMS Technologies has entered  
23 into where it represents it also offices at 207  
24 Washington?

25 A. Certainly, yes, ma'am, I have. And I pay

1 attention to the business terms. I leave the lawyers to  
2 pay attention to the details.

3 Q. That's right. You're not telling this jury  
4 that TechDev -- that EMS Technologies has not ever  
5 represented that its office is based there, are you?

6 A. Oh, no, ma'am, absolutely not.

7 Q. Okay. What about Manufacturing Systems  
8 Technologies? It also offices there, does it not?

9 A. Yes, ma'am, I believe it does.

10 Q. And SFA Systems, LLC, it also offices there,  
11 does it not?

12 A. Yes, ma'am.

13 Q. And then Presentation Specialist Technologies,  
14 it also offices there at 207C North Washington, does it  
15 not?

16 A. Yes, ma'am, I believe it does.

17 Q. And so does Plutus IP, LLC. It also offices  
18 there, does it not?

19 A. I don't think so. I don't think Plutus  
20 remains as a company.

21 Q. When it was a company, it officed at 207C  
22 North Washington, did it not, sir?

23 A. Well, it's -- Plutus became TechDev Holdings,  
24 so it's the same --

25 Q. Same company?

1           A.     Yes.

2           Q.     Okay.   Just like Orion became Clear With  
3 Computers, and when Orion was a company, it officed at  
4 207C North Washington as well?

5           A.     Well, yes, ma'am, they're the same company.

6           Q.     In fact, Mr. Sheafe, you don't ever visit this  
7 Marshall office for any reason that's unrelated to your  
8 ongoing patent litigation here in Marshall, do you, sir?

9           A.     Ma'am, I come here when -- when we're here for  
10 trial, and -- that's correct.

11          Q.     Okay.   And then of the other entities that  
12 we've mentioned of which you own a portion or represent  
13 a portion of as President of TechDev Holdings, they're  
14 never at the Marshall address either, unless they're  
15 here to pursue patent litigation; is that right?

16          A.     I don't know that.

17                   MR. SPANGLER:   Your Honor, may I  
18 approach?

19                   THE COURT:   Yes.

20                   (Bench conference.)

21                   MR. SPANGLER:   Your Honor, we  
22 specifically went into this at the pretrial, that they  
23 were going to be able to talk about the corporate  
24 structure but not the fact that these other entities are  
25 involved in litigation.



1                   She just went right into the fact that  
2 the only reason he comes here is for all those other  
3 entities being involved in litigation. We specifically  
4 addressed this.

5                   MS. DOAN: We did not, Your Honor. We  
6 mentioned the four things we couldn't go into was --  
7 were specific names. We have not done that. We talked  
8 about other specific litigation that we couldn't get  
9 into. All I said was, you're only here in town for  
10 litigation purposes.

11                  MR. SPANGLER: Your Honor?

12                  THE COURT: Yes.

13                  MR. SPANGLER: What she said was, for  
14 these other entities -- she had already talked about  
15 Bright Response -- the only reason you're here is for  
16 litigation.

17                  THE COURT: The other entities.

18                  MS. DOAN: I'll move on, Your Honor,  
19 but --

20                  THE COURT: Well, this has nothing to do  
21 with this case, so let's move on.

22                  MS. DOAN: Thank you, sir.

23                  (Bench conference concluded.)

24                  Q. (By Ms. Doan) Now, Mr. Sheafe, you mentioned  
25 you were the one at Bright Response who looks over the

1 PTO; is that right? The PTO filing, the reexamination,  
2 that's part of your duties?

3 A. Well, I manage the process. Bright Response  
4 also has professional patent counsel that manages the  
5 details of that process.

6 Q. And that patent counsel would be -- is it  
7 HersHKovitz & Associates?

8 A. Yes, ma'am. HersHKovitz & Associates.

9 Q. Do you recall today who the attorney is at  
10 HersHKovitz & Associates that Bright Response works  
11 with?

12 A. Well, there are a number of attorneys there,  
13 and the -- I don't know whether he would technically be  
14 considered the owner. He's the lead guy there. It's a  
15 guy by the name of Abe HersHKovitz.

16 And I talk to him most frequently, but I don't  
17 -- it's not my understanding that there's any one given  
18 attorney that's assigned. It's -- there are a number of  
19 attorneys there that work on it.

20 Q. Okay. And I want to be completely open with  
21 this jury about what the PTO reexamination holds, okay?

22 Have you reviewed all the PTO documents that  
23 have been resubmitted for reexamination?

24 A. I have reviewed them. I look them over, and  
25 if I have questions, I ask. If there's a typo, I point

1 it out. I just -- I try to do my best to oversee that  
2 process, so I can understand it to the extent that I  
3 need to, to be able to manage by response, yes, ma'am.

4 Q. And so to be completely open with us, when  
5 the -- when a party files for an ex parte reexamination,  
6 Bright Response then responds to the Patent & Trademark  
7 Office, correct?

8 A. Well, Bright Response responds to the Patent  
9 Office through its prosecution counsel, Hershkovitz &  
10 Associates.

11 Q. Through its counsel, who always represent you,  
12 right?

13 A. (No response.)

14 Q. I mean, your counsel is acting on your behalf,  
15 correct?

16 A. Oh, yes, ma'am.

17 Q. Okay. But Google and Yahoo!, other than  
18 requesting a reexamination, are not involved in the  
19 process, are they?

20 A. No. It's my understanding that -- we saw a  
21 couple of times up there the word ex parte. And, again,  
22 I'm not an attorney, but it's my understanding that what  
23 that means is, once the party has requested it, if it is  
24 granted, then they are no longer involved in the  
25 process. It's simply a process between the Patent

1 Office and the patent owner.

2 Q. And do you recall when reexamination was first  
3 requested by Yahoo! in this case?

4 A. I think we just looked at it. It was May  
5 21st, 2008.

6 Q. And do you recall when it was first requested  
7 by Google in this process?

8 A. It -- isn't that the date -- my --

9 Q. My first question was, but with respect to  
10 Yahoo!. Do you recall --

11 A. Oh, oh, I'm sorry.

12 Q. -- when a request for reexamination came out?

13 A. With respect to Yahoo!.

14 Q. Yes, sir.

15 A. I'm -- I'm sorry. That one was April -- we  
16 just looked at it -- 29th, maybe, of 2010 (sic).

17 Q. And what about with respect to Google, when  
18 they first requested a request for reexamination?

19 A. Well, to my recollection, it was May 21st,  
20 2008.

21 Q. And when did you file this lawsuit in this  
22 action, sir?

23 A. Well, as I've testified, I wasn't here, but I  
24 believe it was late maybe fall of 2007.

25 Q. 2007.

1           So both requests for reexamination of the '947  
2 patent came in after you sued Google and Yahoo!; is that  
3 correct?

4           A.     Yes, ma'am.

5           Q.     And to be quite candid with this jury,  
6 originally, Claim 30 was also rejected by the PTO,  
7 correct?

8           A.     Well, yes, ma'am. What happens is, you go  
9 through a number of steps in the process. It's not a  
10 simple: Here's the request. Okay. We'll look at it.  
11 Boom, here's the answer.

12                  There are number of -- and, again, I believe  
13 this term has been testified to -- office actions. And  
14 so the Examiner will send an office action out, and  
15 they'll either be non-final or final.

16                  And so if they-are non-final, then the patent  
17 owner has a chance to say: Well, okay. We see your  
18 argument, but have you thought about this?

19                  And so through our counsel, Bright Response  
20 then sends back some arguments, and then the Examiner  
21 will say: All right. You know, maybe I didn't consider  
22 that, and then we'll -- maybe sends out another  
23 non-final or maybe sends out a final office action.

24           Q.     And you had several interchanges between  
25 Bright Response and the PTO, correct?

1           A.     Yes, ma'am, that's correct.

2           Q.     And Google and Yahoo! are not involved with  
3 the interchanges between Bright Response and the PTO,  
4 correct?

5           A.     No. Again, as I just said, when it's  
6 ex parte, it's simply between the owner of the patent  
7 and the Patent Office.

8           Q.     And you told the jury that you submitted lots  
9 and lots of documents when you got in the first request  
10 from the PTO from Google to make sure you had everything  
11 out there, correct?

12          A.     Well, my understanding is, is that what we  
13 were aware of, we submitted to the office. Certainly,  
14 that was our intent.

15          Q.     Absolutely.

16                 And so you sued Google and Yahoo! in 2007;  
17 there was a request for the reexamination in 2008; and  
18 then you submitted every piece of prior art that you  
19 could think of to the PTO.

20                 Do I have that right?

21          A.     Yes. We had the opportunity. As I said, by  
22 the request coming in from Google, that opened the  
23 opportunity for us to then submit that art, and we chose  
24 to take that opportunity.

25          Q.     But you didn't submit the '361 Davis patent,

1 which was the Overture patent that Yahoo! purchased back  
2 in 2003, did you, sir?

3 A. To my knowledge, we didn't have reason to do  
4 that.

5 Q. And you didn't submit any of the Overture  
6 family of patents that deal with search technology for  
7 advertising, did you, sir?

8 A. There were hundreds of documents. I certainly  
9 don't have them memorized.

10 Q. Do you know any patent that you submitted that  
11 had Yahoo! owns dealing with search technology  
12 canonicalization, geo targeting, reordering of words, or  
13 any other patent that Yahoo! has?

14 THE COURT: Excuse me.

15 Objection?

16 MS. DOAN: I'm sorry.

17 MR. FENSTER: May we approach, Your  
18 Honor?

19 THE COURT: Yes.

20 (Bench conference.)

21 MR. VERHOEVEN: I just want to know that  
22 we've now got three different attorneys objecting on  
23 this witness.

24 THE COURT: Well --

25 MR. VERHOEVEN: Thank you, Your Honor.

1           THE COURT: The same rule about objection  
2 by committee that I imposed on the other Defendants,  
3 so...

4           MS. DOAN: Judge, can Mr. Hueston not  
5 handle this since he's handling this witness?

6           THE COURT: Pardon?

7           MS. DOAN: Is Mr. Hueston going to handle  
8 this witness?

9           MR. HUESTON: Well, I'm here, but I --

10          THE COURT: We're at the bench, Ms. Doan.

11          MS. DOAN: I'm sorry.

12          THE COURT: Okay?

13          MS. DOAN: I'm sorry, Your Honor.

14          THE COURT: Yes?

15          MR. FENSTER: Your Honor, none of these  
16 patents have been even suggested as a basis for  
17 invalidity in this case, and Ms. Doan's questioning of  
18 the witness suggests that they --

19          THE COURT: Bring it out on redirect. I  
20 mean, that's the remedy for that. I was thinking the  
21 same thing.

22          MR. FENSTER: All right. Thank you.

23          THE COURT: Step back.

24          (Bench conference concluded.)

25          Q. (By Mr. Doan) I'm sorry, Mr. Sheafe. I



1 don't -- I'm not sure I got your answer.

2 Did you submit any of the Yahoo! patents for  
3 reexamination?

4 A. Did you ask if we had submitted a patent  
5 related to canonicalization?

6 Q. Any of the patents owned by Yahoo! dealing  
7 with a -- serving up an advertisement in response to  
8 keywords.

9 A. I just wanted a chance to try and say it.  
10 Everybody has had a chance.

11 Q. Canonicalization. I'm fourth generation from  
12 here. I think I've got it down.

13 A. I was hoping.

14 To my knowledge -- again, there are hundreds  
15 of documents, so I don't want to -- I'm under oath. I  
16 don't want to promise one way or the other, but to my  
17 knowledge, I don't know that we did, but we may have.

18 Q. You can't point to us any one, can you, sir?

19 A. Well, no, I don't have the list in front of  
20 me.

21 Q. Okay. And I just want to make sure that we've  
22 got clear what the PTO considers.

23 It considers only the prior art that's put in  
24 front of it, correct?

25 A. What it considers in a reexamination -- to be

1 honest with you, I'm not sure. I know in the initial  
2 examination of a patent, a Patent Examiner will go and  
3 try and find other things that weren't presented to the  
4 office.

5 And that may be the case in a reexamination.  
6 I'm just not sure.

7 Q. Okay. Do you know of anything else that the  
8 PTO would consider other than the prior art that's put  
9 in front of it? You just don't know; is that fair?

10 A. Well, I know they would consider prior art  
11 that it is aware of, certainly that which is put in  
12 front of it.

13 Q. Okay. And you know that it does not consider  
14 prior public use. The entire EZ Reader system being  
15 employed at Chase Manhattan Bank, that's something that  
16 the Patent Office does not consider, correct?

17 A. Whether it was being used by the public before  
18 is some of the discussion we've had previously, right?

19 Q. That's not considered by the PTO, is it, sir?

20 A. It's my understanding that it is not, that's  
21 correct.

22 Q. Okay. And it's also not considered by the  
23 Patent Office, the argument of written description.  
24 These particular Claims 30, 31, and 33 being written too  
25 broadly, that's not considered by the Patent Office, is

1 it, sir?

2 A. Well, again, now, written description is --  
3 again, it's kind of a legal term or a patent term, and  
4 there's a bunch of rules that surround what has to be  
5 discussed in the written description.

6 Q. It's not --

7 THE COURT: Hold on just a second.

8 MS. DOAN: Yeah.

9 THE COURT: Do you know one way or the  
10 other whether it's --

11 THE WITNESS: I'm sorry.

12 THE COURT: -- it's considered on reexam?

13 THE WITNESS: I don't think so.

14 THE COURT: Okay. All right. Let's move  
15 on.

16 MS. DOAN: Okay.

17 Q. (By Ms. Doan) And let's look at the document  
18 you put up.

19 MS. DOAN: 1043, please, Alan,  
20 Plaintiff's 1043.

21 Q. (By Ms. Doan) And the mailing date that it has  
22 on the first page there, that would be 7/23/2010; is  
23 that right?

24 A. Yes, ma'am. Down on the right-hand side --  
25 there we go. The mouse was just there.

1 Q. Sure.

2 A. That's the date mailed.

3 Q. And I think, to the best of my recollection,  
4 that's maybe two weeks ago last Friday or maybe a week  
5 ago last Friday?

6 A. It was close, yes, ma'am.

7 Q. Very soon here. Okay.

8 MS. DOAN: Alan, if you'll go a couple of  
9 pages over. It's BR11274.

10 Q. (By Ms. Doan) You covered the claims that had  
11 been confirmed, but I want to look at now the claims  
12 that have been rejected.

13 MS. DOAN: Do you have a pointer?

14 Q. (By Ms. Doan) And the claims that have been  
15 objected are right through here (indicates).

16 A. There we go.

17 Q. And specifically, at the top, it talks about  
18 Claims 15 through 29 were rejected in the '947 patent;  
19 is that correct?

20 A. Yes, ma'am, that's correct.

21 Q. And that includes Claim 26 and Claim 28,  
22 right?

23 A. Yes. As Dr. Rhyne testified, we had to talk  
24 about --

25 Q. Is that correct, sir?

1           A.     It is correct.

2           Q.     Now, you mentioned as well that even though  
3 these claims have been rejected by the PTO, you still  
4 have to prove every element of that claim in order to  
5 prevail on Claim 30.

6                     Do you understand that, sir?

7           A.     Absolutely, yes, ma'am.

8           Q.     Okay. And that includes having a  
9 non-interactive electronic message from a source?

10          A.     Yes, ma'am.

11          Q.     And that includes having a system with rule  
12 base/case base?

13          A.     I'm not the expert. I'd really like for  
14 Dr. Rhyne to speak to that, but certainly, I can answer  
15 your question that every limitation of 26 and 28 have to  
16 be met before you get down the road to 30.

17          Q.     Okay. And that would also include having a  
18 predetermined response?

19          A.     Yes, ma'am, I believe it would.

20          Q.     All right.

21                     MS. DOAN: And, Alan, if you'll go to  
22 11 -- 11280, please.

23          Q.     (By Ms. Doan) And if we'll look at here:  
24 Further, upon appeal, it says, the Examiner maintains  
25 the rejection of Claims, and then it goes into 15

1 through 29.

2 Do you see that?

3 A. Yes, ma'am, I do.

4 Q. And it says they were mainly rejected under 35  
5 USC 102(e) as being anticipated by -- and it's the  
6 Patent No. '664, Allen; is that correct?

7 A. Yes, ma'am. Those patents you've highlighted,  
8 the Office have said that the Allen patent makes -- it  
9 didn't pass the test as to the Allen patent.

10 Q. That's right. And that's Bradley Allen's  
11 patent, correct? You understand that?

12 A. I think his first name is Bradley, yes, ma'am.

13 Q. And you understand that means that his patent  
14 already anticipated these particular claims, 26 and 28,  
15 right?

16 A. Yes, exactly. That's why we didn't assert  
17 them in this case.

18 Q. All right. And if you'll look at Page --

19 MS. DOAN: And, Alan, I'm going to 11282,  
20 please.

21 Q. (By Ms. Doan) And right here in the middle:  
22 Regarding -- and this is the PTO responding to the  
23 patent owner, your comments -- Regarding patent owner's  
24 comments on Pages 24 and 25, the Examiner maintains that  
25 Allen teaches a non-interactive electronic message and

1 fairly -- and fairly teaches classifying.

2 Contrary to the statement found in '947 -- and  
3 then it tells you where it is -- Allen does teach  
4 classifying, and in some cases, a best match is found.

5 Did I read that correctly?

6 A. Yes, ma'am, I believe you did read it  
7 correctly.

8 Q. And then -- so it -- that is the basis for why  
9 it rejected Claims 26 and 28 and continues to reject  
10 those; is that right?

11 A. Well, certainly, that's part of the basis. I  
12 don't think any of us wants to go through all of it.

13 Q. And do you know any other basis besides Allen  
14 that they continue to reject Claims 26 and 28?

15 A. I certainly don't want to talk -- I mean, I  
16 would --

17 Q. That's right.

18 A. -- to review the documents.

19 Q. And when the PTO rejects a claim, that means  
20 each element of that claim, non-interactive electronic  
21 message, case base/rule base system, and predetermined  
22 response, had already been found or anticipated in  
23 another claim -- in another patent, according to this  
24 document, correct?

25 A. We get into some legal terms there, but

1 that -- that -- that's my understanding.

2 Q. Okay. And it also found, in Claim 28, that  
3 classifying had already been anticipated as well,  
4 correct, by the Allen patent?

5 A. Yeah. I think it says it fairly teaches  
6 classifying.

7 Q. All right.

8 MS. DOAN: Now, Alan, if you'll go to  
9 11279.

10 Q. (By Ms. Doan) Now, on Claim 30, it talked  
11 about why Claim 30 was not rejected, correct?

12 A. Yes.

13 Q. It's confirmed. Okay.

14 A. Yes, ma'am.

15 Q. And it was confirmed because the closest prior  
16 art presented in reexamination failed to assign a score  
17 in a stored case model.

18 Do you see that, sir?

19 A. I do see that.

20 Q. And that would be the prior art presented by  
21 Bright Response, because Yahoo! and Google do not  
22 present any prior art at this point, correct?

23 A. Yes, ma'am, that's correct.

24 Q. Okay. And so the prior art that was presented  
25 at this time was the Allen patent alone with respect to



1 Claim 30; is that correct?

2 A. No. I don't -- I think it included all of the  
3 prior art that we had put out. I think it was all of  
4 it. It certainly included the Allen patent, but the  
5 rest of those, you know, dozens of documents.

6 Q. But what had been presented to this date is  
7 why it was not rejected and confirmed at this time,  
8 correct, as of a couple of weeks ago?

9 A. Yes. I mean, only up to the Examiner's  
10 response on the 23rd of July.

11 Q. Because the PTO can only look at the prior art  
12 that's presented to it by the patent owner, correct?

13 A. Well, it can only look at the prior art that's  
14 presented to it. And Google presented some in the form  
15 of the Allen patent, and Bright Response presented much  
16 more in the form of the documents that it submitted.

17 Q. But it can only consider what's presented to  
18 it, right?

19 A. That would be my understanding, yes, ma'am.

20 Q. All right. And the CBR manuals, the CBR  
21 Express 2.0 manuals, they were never presented to the  
22 PTO with respect to Claim 30, were they, sir?

23 A. I don't know.

24 Q. Okay. So this jury is the first body to hear  
25 this, as far as you know; is that right?

1           A.     As far as I know.

2           Q.     Okay. And this jury is the first body to hear  
3 the fact that the prior public use with the deployment  
4 of the EZ Reader in the first quarter of 1996, they're  
5 the first body to consider that, correct?

6           A.     Yes, ma'am, as far as I know.

7           Q.     And they're also the first body to consider  
8 the written description arguments with respect to Claims  
9 30, 31, and 33; is that right?

10          A.     That sort of goes beyond where I'm  
11 comfortable, you know, saying for sure, but that's my  
12 understanding.

13          Q.     Did Bright Response ever submit the testimony  
14 of Bradley Allen to the PTO?

15          A.     Testimony to what?

16          Q.     Of Bradley Allen, the inventor of the Allen  
17 patent? Do you know whether he ever testified to the  
18 Patent & Trademark Office regarding the '947 patent?

19          A.     I don't know.

20          Q.     Okay. So this body, this jury, is going to be  
21 the first to consider Bradley Allen and his testimony,  
22 as far as you know, correct?

23          A.     Well, if he has testimony and it wasn't  
24 presented to the PTO, or I guess anyone else, then this  
25 jury would be the first, yes, ma'am.

1           Q.    And do you know whether Bright Response  
2 submitted any testimony of Chuck Williams to the PTO in  
3 the reexamination process?

4           A.    Certainly not to my knowledge.

5           Q.    Okay.  And so this body, this jury, that's  
6 here with us today will be the first body to consider  
7 Chuck Williams' testimony as well, correct?

8           A.    Well, I don't know, ma'am.  I don't who else  
9 may have been submitted.

10          Q.    All right.  Now, let's look at the EZ Reader,  
11 sir.

12                   And Bright Response knows the EZ Reader was a  
13 project that strove to implement some of the claims in  
14 the '947 patent, correct?

15          A.    I think I may have had -- testified at some  
16 point in time in a deposition to what EZ Reader tried to  
17 do.  I'm not an expert on EZ Reader, but I do know it  
18 was the provisional application for the patent.

19          Q.    Do you remember telling me, sir, on June 3rd,  
20 2010, of this year, that the EZ Reader was a project  
21 that strove to implement some of the claims in the '947  
22 patent?

23          A.    I think that what -- were you there, Ms. Doan?

24          Q.    I'm not sure I was there, but I know our party  
25 was there, sir.

1           A.     Okay.  Yeah.  I remember telling whoever was  
2 taking my deposition that that was -- that was my  
3 understanding, yes, ma'am.

4           Q.     All right.  And do you remember telling Yahoo!  
5 and Google that you did not even remember who the  
6 specific authors of the EZ Reader article were?  Fair?

7           A.     Yes, ma'am.

8           Q.     Okay.  And you remember saying, just like  
9 Ms. Rice said the other day, that it's possible that  
10 Ms. Rice could have written the article but not have  
11 been involved in implementing the project at Chase,  
12 correct?

13          A.     Did you say it's possible that --

14          Q.     Yes.  You said it was possible that the author  
15 of the EZ Reader article, Ms. Rice, could have been --  
16 could have written the article, but she might not have  
17 been involved in implementing the project at Chase.

18          A.     I guess it's possible that someone could write  
19 an article to include Ms. Rice and not be directly  
20 involved in the implementation, but we've heard from  
21 Ms. Rice, so...

22          Q.     And you also know that Bright -- that she has  
23 told this jury that she has misrepresented facts that  
24 she made in the EZ Reader article.  That's her story 15  
25 years later.

1                   MR. HUESTON:  Objection.  That's not the  
2 witness' testimony.

3                   THE COURT:  Sustained.

4           Q.     (By Ms. Doan) Did Bright Response do any type  
5 of investigation to determine whether Ms. Rice's  
6 statements were correct or incorrect in the EZ Reader  
7 article?

8           A.     Not to my knowledge.

9           Q.     And it's Bright Response's understanding, at  
10 least as of June 2010, that indeed the invention claimed  
11 in the '947 patent was conceived and reduced to practice  
12 between November 1995 and April 1996, correct?

13          A.     Those are legal terms conceived and reduced to  
14 practice, and I'm not sure I completely understand them.

15          Q.     Do you recall being asked that specific  
16 question, sir?

17          A.     I may have been.

18          Q.     Do you recall that you were at -- you were  
19 noticed for subpoena as a representative of Bright  
20 Response, and you spoke on behalf of the company with  
21 respect to the entire company's knowledge?

22                   Do you recall that?

23          A.     Yes, ma'am, I certainly remember that.

24          Q.     And you recall being deposed under oath, just  
25 like you are here today, correct?

1           A.     Absolutely, yes, ma'am.

2                   MS. DOAN:   And, Counsel, it's Page 192,  
3 Line 24 through 193, Line 11.

4                   MR. HUESTON:   No objection.

5           Q.     (By Ms. Doan) And the question at the bottom  
6 reads there:   Does Bright Response know when in April of  
7 1996 this conception and reduction to practice was  
8 com -- was completed?

9                   And there was an objection, and you testified:  
10 No.   Again, it's Bright Response's understanding that  
11 between approximately November of 1995 and April of  
12 1996 -- so it's possible that it was completed.  
13 It's our understanding it was complete -- it was  
14 completed approximately between those months, where  
15 within those months, what stages of conception or  
16 reduction to practice occurred, Bright Response has no  
17 further information.

18                   Did I read that correctly, sir?

19           A.     Yes, ma'am.   Thank you.

20           Q.     Now I want to talk briefly about Bright  
21 Response's assigning of the value of the '947 patent,  
22 okay?

23           A.     Okay.

24           Q.     All right.   Bright Response does not have any  
25 type of view as to which of the three patents it owns is

1 currently more or less favorable than its other patents,  
2 does it?

3 A. We would -- you know, we attempt to get all  
4 the value out of those patents that we can, and, you  
5 know, I don't know that we would ascribe a higher or  
6 lower value, because there would be a number of  
7 variables that would apply as to which ones were  
8 higher -- had the most value in a given situation.

9 Q. Sure. And Bright Response owns three patents,  
10 correct?

11 A. Yes, ma'am.

12 Q. Do you know those three patent numbers, sir?

13 A. I do. I know them by their last three  
14 numbers.

15 They're the Rice patent, which is the '947  
16 patent, which we've heard all this testimony about.  
17 There's the '059 patent, which has the same set of  
18 inventors that the Rice patent does.

19 And then there's the '996 patent, and the lead  
20 inventor on that patent is Richardson.

21 Q. Okay. And that's -- those are the three  
22 property -- the three patents that Bright Response owns,  
23 correct?

24 A. Yes, ma'am.

25 Q. And the other entities of which are -- also

1 come under your purview as President of TechDev Holdings  
2 that we mentioned earlier, EMS Technologies, et cetera,  
3 they also own patents as well, correct?

4 THE COURT: Let's move along to something  
5 relevant, Ms. Doan.

6 MS. DOAN: Sure.

7 Q. (By Ms. Doan) But as far as the '947 patent,  
8 Mr. Sheafe, you've not assigned any particular value to  
9 that patent, have you, sir?

10 A. Are you referring to a monetary value --

11 Q. Yes, sir.

12 A. -- as something we would sell it for this or  
13 something like that?

14 Q. You've not put a value on the '947 patent in  
15 relation to the other patents that you have?

16 A. Again, I would -- it just varies. It depends  
17 on the situation.

18 Q. I mean, you don't have a view as to which  
19 patent is more valuable than the others?

20 A. Not -- not just -- without some context, I  
21 certainly don't.

22 Q. And how much did Bright Response pay for the  
23 '947 patent?

24 A. I don't know. It was a transaction between  
25 two related companies, and I just don't know.



1           Q.     Okay.  And was -- the company's name before  
2 Bright Response was Polaris; is that right?

3           A.     Yes, ma'am.  We changed its name from Polaris  
4 to Bright Response.

5           Q.     Okay.  And it changes names from Polaris --  
6 was it IP, LLC -- to Bright Response in 19 -- in 2008;  
7 is that right?

8           A.     I think it was 2008, yes, ma'am.

9           Q.     The year after you filed the lawsuit; is that  
10 right?

11          A.     Yes, ma'am.  The lawsuit was filed in 2007, so  
12 the next year would be 2008.

13          Q.     And the assignment to Polaris was for zero  
14 consideration; isn't that correct?

15          A.     I don't know.

16          Q.     You don't know anything about that?

17          A.     Well, I know that it occurred.  I don't recall  
18 what the actual consideration was, if I ever knew.

19          Q.     Do you recall me asking you about the  
20 acquisition of the '947 patent, and you testified that  
21 Polaris acquired the '947 patent in February 6th, 2006?

22                   Do you recall that?

23          A.     You asking me that?

24          Q.     Yes.

25          A.     I don't recall you asking me that, no, ma'am.

1           Q.    Well, whether an attorney for Yahoo! or  
2 Google -- is that the distinction you're making here,  
3 sir?

4           A.    No.  I just want to make sure if we're talking  
5 about today or if we're talking about some other time.

6           Q.    Okay.  Did Polaris acquire the '947 patent --  
7 it acquired them in 2006, correct?

8           A.    I think that's when Polaris acquired the  
9 patents, because that was the name at the time.

10          Q.    Right.  And then Polaris filed a lawsuit  
11 against Yahoo! and Google in 2007, correct?

12          A.    That's my understanding, yes, ma'am.

13          Q.    And then Polaris decided to change its name to  
14 Bright Response in 2008, correct?

15          A.    That's correct.

16          Q.    And you don't know if Polaris received any  
17 type of documentation or information regarding the '947  
18 patent as part of the purchase, do you, sir?

19          A.    No, ma'am.  I recall, with your attorney, we  
20 discussed this, and I don't know what sort of  
21 documentation was received.  I think we discussed the  
22 fact it was a related company and whatever documentation  
23 was probably passed along, but I don't know.

24          Q.    And you can't point Yahoo! or Google to any  
25 type of consideration that Polaris paid in the

1 assignment -- receiving the assignment of the patent,  
2 can you, sir?

3 A. Certainly I can't, no, ma'am.

4 Q. Okay. And before -- and the acquisition was  
5 between Circinus and Polaris.

6 Do you recall that?

7 A. Yes, ma'am. I think Circinus was another  
8 company, and there was a merger there, I believe, where  
9 Circinus became Polaris.

10 Q. And I believe you testified under oath back in  
11 June that you don't know of any transfer of funds for  
12 the assignment between Circinus and Polaris.

13 Do you recall that, sir?

14 A. Yes, ma'am. I don't -- I don't know of any  
15 transfer of funds.

16 Q. And then Circinus acquired the patent from  
17 Orion.

18 Do you recall that, sir?

19 A. I believe that's the case, yes, ma'am.

20 Q. And you don't know that -- if any type of  
21 compensation was paid at all in the transfer between  
22 Orion and Circinus of the '947 patent, do you, sir?

23 A. Again, ma'am, I don't know.

24 Q. Now, you told us that you're aware that the  
25 name changed to Bright Response in 2008. Do you

1 remember who came up with the name Bright Response?

2 A. No, ma'am, I don't.

3 Q. Were you involved with the decision to rename  
4 Bright Response?

5 A. No, ma'am, I was not.

6 Q. Do you know who was involved with that  
7 decision?

8 A. No, ma'am, I don't.

9 Q. And you're not in any way affiliated with the  
10 product Bright Response, are you?

11 A. No, ma'am.

12 Q. Okay. And you're also not affiliated in any  
13 way with Brightware, the prior owner of the '947 patent,  
14 are you, sir?

15 A. No, ma'am, we're not.

16 Q. So Brightware is a completely distinct entity  
17 that has nothing to do with Bright Response.

18 A. Well, was, yes, ma'am.

19 Q. Was a complete distinct entity?

20 A. Yes, ma'am.

21 Q. Okay. And Bright Response doesn't own any  
22 type of trademarks either, does it, sir?

23 A. Not to my knowledge.

24 MS. DOAN: Just a second, Judge. I'm  
25 sorry.

1 Q. (By Ms. Doan) I'm showing you, Mr. Sheafe,  
2 what's been marked on the first page as Plaintiff's  
3 Exhibit 595.

4 MS. DOAN: Can you do that for me?

5 COURTROOM DEPUTY: Uh-huh.

6 Q. (By Ms. Doan) Do you see that, sir?

7 A. I do.

8 Q. Okay. And it says Brightware, and it's got a  
9 registered trademark here (indicates)?

10 A. I do.

11 Q. And you're aware that the registered  
12 trademarks are issued by the Patent Office, the same  
13 Patent Office for which patents are either approved or  
14 rejected?

15 A. Yes, ma'am.

16 Q. And you're aware that Brightware is still the  
17 owner of its Brightware trademark and mark?

18 A. I don't know, ma'am.

19 Q. You don't know that?

20 A. No, ma'am, I don't.

21 Q. You don't know that's a public record that  
22 Brightware still owns its own trademark?

23 A. It may be public record, yes, ma'am.

24 Q. And you're aware that this is the slide that  
25 your counsel put up at the beginning of this lawsuit?

1           A.     Yes, ma'am.

2           Q.     It's the first demonstration slides, and you  
3 see it has the same mark that Brightware has?

4           A.     The same logo?

5           Q.     The same mark, yes, sir. This with a star.

6           A.     Yes, ma'am, I do.

7           Q.     Same registered trademark that's still  
8 registered to Brightware?

9           A.     I don't know.

10          Q.     Now, you're not trying to tell this jury that  
11 somehow Bright Response and Brightware are in any way  
12 affiliated or the same entity, because they're  
13 distinctly different, aren't (sic) you, sir?

14          A.     No, ma'am. I hope I've been clear. We are  
15 distinctly different companies.

16          Q.     In fact, when Yahoo! and Google lawyers  
17 visited with you, you hadn't even read the '947 patent  
18 at that time, as of June 2010, had you, sir?

19          A.     I believe what I said was I hadn't read it  
20 cover to cover but that I had certainly been through it  
21 a number of times.

22          Q.     You said you had read certain sections several  
23 times, correct?

24          A.     Yes, ma'am.

25          Q.     I'm assuming those are Claims 30, 31, and 33.

1           A.     No, ma'am. Those were the specification and  
2 the claims.

3           Q.     Okay. So you -- but you have read certain  
4 sections, but you've not read the entire patent.

5           A.     I haven't read all the references and looked  
6 at all of the figures and -- no, ma'am.

7           Q.     And as of June 2010, you had not spoken to any  
8 of the inventors, had you, sir?

9           A.     No, ma'am.

10          Q.     Including Amy Rice. You had never spoken to  
11 her; is that right?

12          A.     That is correct.

13          Q.     And yet she sat with you at counsel table this  
14 week, did she not?

15          A.     She did, yes, ma'am.

16          Q.     And Bright Response, you told us, had not paid  
17 any money to any named inventor for consulting services;  
18 is that correct?

19          A.     That's my understanding, yes, ma'am.

20          Q.     And yet you told us that your counsel had  
21 entered into consultation agreements with the inventors  
22 and had represented them as well, correct?

23          A.     I believe I said that was my understanding,  
24 yes, ma'am.

25          Q.     Okay. And so you're not trying to tell this

1 jury that somehow Amy Rice is in any way affiliated with  
2 Bright Response.

3 A. No, ma'am.

4 Q. In fact, she's a consultant for Bright  
5 Response, correct?

6 A. Well, yes, ma'am, through -- through -- if  
7 their relationship exists with the counsel, then --

8 Q. Sure.

9 A. -- it's fair to consider her a consultant for  
10 Bright Response.

11 Q. And I think we saw on Ms. Rice's  
12 cross-examination that indeed she does have a  
13 consultation agreement with one of your counsel at  
14 counsel table, does she not?

15 A. I think we did, yes, ma'am.

16 Q. Now, Mr. Sheafe, it's true that Bright  
17 Response didn't contact Google before it filed this  
18 lawsuit, did it?

19 A. Well, again, I wasn't at the company at the  
20 time, but not to my knowledge.

21 Q. And Bright Response didn't contact Yahoo!  
22 before they sued them, did they?

23 A. Same set of circumstances.

24 Q. And as far as you know, Bright Response has  
25 not done any type of analysis as to whether Google



1 infringed the '947 patent before it brought this  
2 lawsuit, does it?

3 A. Well, it's my understanding that some sort of  
4 analysis has to be performed before you bring a lawsuit  
5 or the lawyers get in trouble.

6 Q. I'm not asking you to speculate, sir.  
7 Under oath, did Bright Response -- do you know of any  
8 analysis that Bright Response did, with respect to  
9 Google and Yahoo!, as to whether they infringed the  
10 '9 -- '947 patent before you filed this lawsuit?

11 A. Well, other than that, no, ma'am.

12 Q. You don't know of anything, do you -- do you,  
13 sir?

14 A. Well, I certainly presume my attorneys did  
15 what they were supposed to do, but beyond that, no,  
16 ma'am.

17 Q. And I'm assuming that you don't have an  
18 opinion as to whether a non-infringing -- what a  
19 non-infringing alternative is, do you, sir?

20 A. No, ma'am. I rely on our experts for that.

21 Q. And as far as you know, Bright Response did  
22 not consider Yahoo!'s other patent portfolios with  
23 Overture or with the Davis patent before it filed this  
24 lawsuit against Yahoo!, did it, sir?

25 MR. HUESTON: Objection, asked and

1 answered.

2 MS. DOAN: I think we talked about the  
3 PTO before, Judge.

4 THE COURT: Overruled. If you know.

5 A. I'm sorry. Ask me the question again. I want  
6 to make sure I answer it correctly.

7 Q. (By Ms. Doan) Did Bright Response, before it  
8 filed this lawsuit --

9 A. Okay.

10 Q. -- did it consider whether -- look for any  
11 other patents that Yahoo! had, with respect to the Davis  
12 patent -- did it consider the Davis patent; did it  
13 consider the Overture patents; did it consider their  
14 entire family of patents on search technology in  
15 response to keyword searching and serving up ads?

16 MR. HUESTON: Objection, relevance.

17 THE COURT: Overruled.

18 A. I don't get to say canonicalization again?  
19 I would -- again, beyond that research that the  
20 attorneys have to do in order to stay out of trouble, I  
21 don't -- I'm not aware if there was any or not.

22 Q. (By Ms. Doan) Did Bright Response consider  
23 whether Yahoo! had still have been using the same  
24 Sponsored Search system since 2001 before it filed a  
25 lawsuit against it in 2007, sir?

1           A.     Again, beyond that research that the attorneys  
2 have to do, I'm not aware of whether there was or  
3 wasn't.

4           Q.     You can't -- you can't tell us of any analysis  
5 that Bright Response performed as to whether Yahoo!'s  
6 Overture system back in 2001 was any way different than  
7 the Overture system it's still using in 2004, which you  
8 think is the date of first infringement; that's correct,  
9 sir, right?

10          A.     Again, beyond what the attorneys have to do in  
11 order to file a fair lawsuit, I'm not aware of any. It  
12 could have been or not.

13          Q.     And you don't know of any as you sit here on  
14 this stand; is that correct?

15          A.     No, ma'am, I wasn't there.

16          Q.     And you did not consider -- Bright Response  
17 did not consider Yahoo!'s system that had been serving  
18 up ads in response to keywords since 1996 before it  
19 filed this lawsuit against it, did it, sir?

20          A.     I'm going to -- I'll say the same thing. I --  
21 beyond --

22          Q.     You don't know of anything that was considered  
23 in your analysis; is that correct?

24          A.     I know the lawyers performed an analysis, and  
25 beyond that, I'm just not aware.

1           Q.     So Bright Response -- as far as your sitting  
2 on the stand today, without deferring to your lawyers,  
3 Bright Response did not consider that Yahoo! had been  
4 serving up ads since 1996 in response to keyword  
5 searches?

6           A.     I wasn't there. I don't know.

7           Q.     Did Bright Response consider any of Google's  
8 systems before it decided to file a lawsuit against  
9 Google on the '947 patent?

10          A.     And, again, you want me to set aside the  
11 research that's done by the attorneys; is that correct?

12          Q.     Can you tell us -- are you willing to tell us  
13 what research the lawyers did right now, sir?

14          A.     I don't know.

15          Q.     You don't know of any that they did, correct?

16          A.     I know they did it. I'm not involved in it,  
17 no, ma'am.

18                   THE COURT: Well, Ladies and Gentlemen,  
19 we're going to break for lunch at this time.

20                   Be ready to come in the courtroom at  
21 1:15.

22                   LAW CLERK: All rise.

23                   THE COURT: Don't talk about the case.

24                   (Jury out.)

25                   THE COURT: All right. You can step

1 down.

2 Have a seat.

3 Ms. Doan, Plaintiff's Motion in Limine  
4 27: Any reference to any other lawsuits filed by Bright  
5 Response or by companies affiliated with Bright  
6 Response.

7 The ruling at the pretrial reference: 27  
8 is granted.

9 Ruling by written order of the Court:  
10 27, granted.

11 Motion in Limine 31: Any reference to  
12 other litigations involving Mr. Erich Spangenberg,  
13 regardless of whether that involvement or connection of  
14 that lawsuit, as individual or as managerial or other  
15 corporate capacity, concerning any corporate entity,  
16 regardless of whether it is a company affiliated with  
17 the Plaintiff Bright Response.

18 At the pretrial conference: Orally, 31  
19 is granted.

20 By written order of the Court: 31,  
21 granted.

22 How are your questions regarding the only  
23 time that the witness is in Marshall, Texas, is when  
24 he's here in Marshall involved in other litigations, how  
25 does that not fly right in the face of those two orders

1 in limine?

2 MS. DOAN: Your Honor, I thought it was  
3 specific litigations, to mention of specific names of  
4 other litigations, and I don't recall asking any  
5 question about Erich Spangenberg's litigations at all,  
6 sir.

7 THE COURT: Well, I will look at the  
8 transcript. It's certainly suggesting --

9 MS. DOAN: Your Honor, I did not mean to  
10 violate the motion in limine. If I came close to it,  
11 that's why I approached every -- before we ever started.

12 THE COURT: You didn't approach at all  
13 about --

14 MS. DOAN: I didn't know it was close,  
15 and I am terribly sorry, Your Honor, if it is, and I  
16 just --

17 THE COURT: And you just asked questions  
18 repeatedly to the witness concerning what work his  
19 counsel did discharging their Rule 11 obligations.

20 Now -- directly in the -- calling for the  
21 revelation of privilege and work product.

22 MS. DOAN: Your Honor --

23 THE COURT: No, no, no.

24 MS. DOAN: May I respond?

25 THE COURT: Not just yet.

1 MS. DOAN: Okay.

2 THE COURT: I'll see you at ten after  
3 1:00 with the instruction I intend to give.

4 LAW CLERK: All rise.

5 (Lunch recess.)

6 \* \* \* \* \*

7

8

9 CERTIFICATION

10

11 I HEREBY CERTIFY that the foregoing is a  
12 true and correct transcript from the stenographic notes  
13 of the proceedings in the above-entitled matter to the  
14 best of my ability.

15

16

17

18 /s/\_\_\_\_\_  
SUSAN SIMMONS, CSR  
19 Official Court Reporter  
State of Texas No.: 267  
20 Expiration Date: 12/31/10

\_\_\_\_\_  
Date

21

22

23 /s/\_\_\_\_\_  
JUDITH WERLINGER, CSR  
24 Deputy Official Court Reporter  
State of Texas No.: 731  
25 Expiration Date: 12/31/10

\_\_\_\_\_  
Date